TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 246.

THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO,
PLAINTIFF IN ERROR,

vs.

RICHARD P. THOMAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED NOVEMBER 13, 1899.

(16,452.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 673.

THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, PLAINTIFF IN ERROR,

vs.

RICHARD P. THOMAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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a In the Supreme Court of the State of California.

JOHN CHETWOOD, JR., Plaintiff and Respondent,
v.
THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, a Corporation; Richard P. Thomas *et al.*, Defendants; Richard P. Thomas, Appellant. } No. S. F. 177.

Transcript on Appeal.

J. A. Stephens, attorney for appellant.
Thompson & Thompson, attorneys for plaintiff.

Filed July 3rd, 1895.

T. H. WARD, *Clerk*,
By E. A. BUTTERWORTH,
Deputy Clerk.

1 *Amended Complaint.*

In the Supreme Court of the State of California.

In the Superior Court of the City and County of San Francisco, State of California, Department No. 3.

JOHN CHETWOOD, JR., Plaintiff,
vs.
THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, a Corporation; Richard P. Thomas, Robert R. Thompson, Robert A. Wilson, and S. P. Young, Receiver of said Bank, Defendants.

Bill of complaint in equity for accounting and settlement of trust by the defendants Richard P. Thomas, Robert R. Thompson, and Robert A. Wilson.

2 The plaintiff herein, individually and as the representative of all of the stockholders of the corporation the California National Bank of San Francisco, for the benefit of the said corporation, files this bill of complaint herein and alleges:

That the California National Bank of San Francisco, on or about the 20th day of October, A. D. 1886, became, ever since then has been and it now is a national banking corporation, duly organized and existing under the laws of the United States of America, with a capital stock of two hundred thousand ($200,000) dollars, divided into two thousand (2,000) shares of the par value of one hundred ($100) dollars each.

That, on or about the date above mentioned, all of the said capital stock of said corporation was duly taken and fully paid up by divers persons of whom the plaintiff herein was one; that this plaintiff, on or about the said date, so as aforesaid, became one of the stockholders of said corporation; he duly subscribed for and

took twenty (20) shares of said stock and unto said corporation duly paid for the same the full par value thereof, to wit, the sum
3 of two thousand ($2,000) dollars in gold coin of the United States of America.

That plaintiff never has sold or in any way disposed of his said stock or any part thereof, but ever since about the 20th day of October, A. D. 1886, he, this plaintiff, continuously has been, and he now is, the holder and owner of said twenty shares of capital stock of said corporation.

That in and upon the creation of said corporation it was in due form in and by its articles of association provided that its board of directors should be and consist of seven of the shareholders thereof.

That on or about the 20th day of October, A. D. 1886, the first meeting of the shareholders of said corporation, upon due and sufficient notice, was duly held, and at said meeting the board of seven directors was duly elected; each and all of said seven directors were shareholders of said corporation; they accepted said position of directors and thereupon, on or about said date, the said board of seven directors duly organized.

That in and by the aforesaid articles of association of said
4 corporation the following provisions were each duly made and adopted, to wit:

That the board of directors of said corporation should have power, and it was made its duty, from their number to elect a president and vice-president, define the duties of the officers and clerks of the corporation, to make all by-laws which it might be convenient and proper to have made, for the general regulation of the business of the corporation and the management and administration of its affairs, and generally, to do and perform all the acts legal for a board of directors to do.

That the above-named defendants Richard P. Thomas, Robert R. Thompson and Robert A. Wilson, were three of the seven persons who were so, as aforesaid, elected directors of said corporation; after said first election of directors, shareholders' meetings were, annually held, at which the same three persons were re-elected directors; and they have, each and all three of them, remained, and they still are, such directors.

That, on or about said date above mentioned, said seven persons, the board of directors of said corporation, after their election
5 as such, on due notice held a regular meeting of said board and duly adopted a code of by-laws for said corporation and its said board of directors, which said code of by-laws has never, as this plaintiff is informed and believes and on his said information and belief alleges, in any respect been changed, ever since its adoption it has been and still is in full force and effect; the said code of by-laws is in sections duly numbered from 1 to 25. Section 7 of said code of by-laws, is as follows, to wit:

"Executive Committee—Its Duties and Powers.

"SEC. 7. There shall be appointed by the board of directors a committee known as the executive committee, consisting of the president, vice-president, and one or more directors, to continue to act until succeeded, who shall have and exercise immediate supervision of all the officers and business of this bank; who shall audit all bills for current and other expenses, who shall have power to discount and purchase bills, notes and other evidences of debt, and to buy and sell bills of exchange, coin and bullion, and loan money on personal security, and who shall at each regular meeting of the board of directors make a report of all bills, notes and other evidences of debt discounted or purchased by them for the bank and of concurrent and other expenses audited since their last previous report."

Section 17 of said code of by-laws is as follows:

"The president shall have general control and supervision of the affairs of the bank; he shall sign all certificates of stock, all receipts for circulating notes received from the Comptroller of the Currency, and also shall have authority to sign all contracts, evidences of debt or other instruments proper and necessary in the ordinary course of business of the bank or which has been approved by the board of directors. He shall have power and authority to discount bills, notes, or other evidences of debt and make loans not exceeding ten thousand dollars to any single individual, firm or corporation, buy and sell exchange, sign certificates of deposit and draw checks and warrants upon the bank. He shall be responsible for all sums of money and personal property of every kind which may be entrusted to his care or come under his control as president; and he shall pay over and deliver the same upon the order of the board of directors, or to any person who may be authorized to demand and receive the same. He shall call special meetings of the board of directors and of the stockholders whenever the interests of the bank shall require or whenever requested by two directors. He shall perform all duties required of him by the bank laws of the United States, or by its proper officers, and shall see that all reports are promptly and accurately made and forwarded. He shall give bond in the sum of ten thousand dollars with security to be approved by the board of directors for the faithful discharge of his duties. He shall also prepare and present to the stockholders at their annual meeting such a statement of the property and business of the bank for the preceding year, as will enable them to understand fully the financial condition and prospects of the bank. He shall also have supervision of all employees of the bank and may suspend them when necessary, reporting his action and occasion thereof to the board of directors, at its next meeting."

Section eighteen of said code of by-laws is as follows:

8 *"Vice-President's Duties and Powers.*

"SEC. 18. The vice-president shall assist the president in the discharge of his duties, and in the absence or inability of the president he shall perform all the acts, exercise all the powers, and be subject to the same liabilities as that officer. He shall give bond in the sum of ten thousand dollars, with security to be approved by the board of directors, for the faithful discharge of his duties."

That, thereupon at said meeting of the board of directors after the adoption of said code of by-laws, subject to and in accordance therewith, an election of officers of said corporation and board of directors thereof, the above-named defendants Robert A. Wilson & Richard P. Thomas were duly & respectively elected vice-president & president of said corporation and board of directors thereof, and the three defendants above named, Richard P. Thomas, Robert R. Thompson and Robert A. Wilson, were duly elected and by said board appointed the executive committee of said corporation and board of directors and no other director was elected or appointed on said committee, and ever since the organization of the board
9 in October, 1886, said three persons have constituted and been the said executive committee under said by-laws.

That thereupon each of said defendants, Thomas, Thompson and Wilson, duly accepted said offices to which they had, as last herein aforesaid, been elected and appointed; annually, after said first organization of the board of directors, upon the seven directors being re-elected, as herein aforesaid, the said board reorganized and re-elected said officers, to wit, the defendant Richard P. Thomas as president, the defendant Robert A. Wilson as vice-president, and the three defendants, Richard P. Thomas, Robert R. Thompson and Robert A. Wilson, as executive committee, and said three defendants, Thomas, Thompson and Wilson, from the time, in October, 1886, of their first election continuously were and remained, and they still are and remain the said officers of the corporation and its board of directors, to wit, Richard P. Thomas, president; Robert A. Wilson, vice-president, and Richard P. Thomas, Robert R. Thompson and Robert A. Wilson the executive committee of said corporation and board of directors.

10 That upon their said election and appointment as such officers the said three defendants severally and as such president, vice-president and executive committee, duly accepted the potions of the respective officers and as provided in the above-mentioned code of by-laws and the above-quoted sections thereof, and duly accepted the trusts and obligations to perform each and all of the duties therein prescribed with due skill, care, attention, prudence, diligence and fidelity. That as such executive committee said three persons, Richard P. Thomas, Robert R. Thompson and Robert A. Wilson, immediately upon their said election and appointment as such committee assumed the discharge of the duties thereof, and in due performance of their duties had, from said date of their first

appointment in October, 1886, continuously until the failure of said corporation, which is hereinafter mentioned, the immediate supervision of all the officers and business of said corporation; on the said three said persons, the above-named defendants, Thomas, Thompson and Wilson, as such executive committee, devolved, and continuously remained throughout all of said time, the duty to exercise immediate supervision of all of the officers and business of said bank for
11 said corporation to audit all bills for current and other expenses, to discount and purchase bills, notes and other evidences of debt, to buy and sell bills of exchange, coin and bullion and loan money on personal security, to order, direct and superintend the acts and proceedings of the cashier, clerks and other employés and to exercise vigilence in seeing that the money and other property of the bank were not lost, wasted or misused, and to conduct the business of the corporation upon banking principles, and in such conduct thereof to exercise their own skill and discretion with a view to the preservation of the capital and profit of the corporation, and to cause true records and proper books of account to be kept, and to examine them, personally, with the vouchers; to see that the moneys of the bank were not lent to irresponsible persons or upon inadequate security, or upon securities not conforming to bank usage, or otherwise irregular; to see that, in the purchase of bills of exchange or drafts the same were duly secured, safe and sure to be honored and paid, and were such as conformed in all respects to bank usage and the rules of safe banking.

That it was the duty of each of said members of the exec-
12 utive committee to exercise, concurrently with his associates on said committee, diligence and fidelity in performing the duties of said committee as above detailed. That, well knowing each and all of said facts above recited, and said three persons, above named defendants, Thomas, Thompson and Wilson, severally, being fully aware of the nature and extent of said trust and the duties thereof, accepted and retained the said trust and unto the said corporation promised faithfully to discharge the same and each and all of the said duties thereof in a proper, careful and judicious manner, and with due care, attention, skill, prudence, diligence and fidelity, in full accord with bank usage and the principles of safe banking business, and the said corporation fully confided in their fidelity and diligence and so confiding, entrusted unto said three persons the discharge of the said duties, and duly appointed and retained them in their respective offices.

That the business of said banking corporation was commenced shortly after October, 1886, but afterwards, and for a long space of time the defendants above mentioned, Richard P. Thomas, Robert R.
Thompson and Robert A. Wilson not regarding their aforesaid
13 duties, nor their respective and concurent promises in that behalf, but wholly disregarding the same and contriving together to injure and deceive the said corporation, neglected and omitted, without any reasonable excuse, to exercise their own skill, care, judgment and discretion in the making of loans and discounts out of the moneys in the possession of said bank and otherwise di-

recting the business of said bank, but they negligently permitted the cashier of said bank to control and manage the whole business of the said bank as he saw fit, and without consulting or in anywise informing said defendants, or any or either of them, to lend the moneys of the said bank according to his own pleasure, to buy bills of exchange without any consultation with said defendants or any or either of them, and in such a manner as he, the said cashier, elected, to dispose of all the moneys of said bank, and the said cashier, of his own will and without direction or attempted direction of or by said defendants or any or either of them, lent out of the moneys of said bank large sums of money to divers irresponsible persons with no adequate security, bought unauthorized, unsecured & valueless bills of exchange, & on informal promises
14 & pretended securities which were of little or no value & such as were not usual in bank dealing nor capable of discount nor well approved as banking securities nor safe securities for any bank to take, or well adopted to preserve the capital stock thereof; all of which said loans, notes, drafts & bills of exchange were & are wholly valueless & unpaid & cannot in anywise be realized upon.

That by such negligence worthless loans, & the various transactions above mentioned, the moneys of the corporation were wasted, misused & lost, as this plaintiff is informed & believes, & on his information & belief alleges, at the time of the failure of the bank hereinafter referred to, to a sum & amount of about two hundred thousand dollars.

That to this plaintiff the entire details of the misuse of the money of the bank are unknown; that one of the improper uses of said money was as follows: to wit—

Some time in the summer of 1888 one J. H. Woodard, who was a man of no considerable means, offered for discount to said cashier his, the said Woodard's drafts, & also the drafts of the Alameda County Railroad Company, on one Daniel Macauley of New
15 York, who was also a man of no capital or good financial standing. Said drafts were unsecured, & neither the drawer or drawee had any credit, standing or means at all commensurate with the amounts of said drafts, which in all amounted to about seventy-seven thousand dollars; and to buy them at any price was highly injudicious, inconsistent with banking principles, reckless & wrong, but, notwithstanding these facts & his knowledge thereof, said cashier bought the drafts of Woodard & paid therefor about the sum of seventy-seven thousand dollars. Said drafts were not paid but were dishonored, no part of the money ever was, could or can be recovered and the corporation lost all of the said money except the sum of $7,500.

Another instance of the aforesaid negligences & omission was as follows: At about the same time as the Woodard transaction above mentioned one David Gutman offered the bank his drafts for discount on one Birnbaum of New York. Neither the said Gutman nor the said Birnbaum were men of any considerable means or of good financial standing and said drafts were not secured, but said

cashier bought the drafts from Gutman to the extent of about $68,000. Said drafts were not paid but were dishonored and
16 no part of the purchase price thereof ever has been or can be recovered except the sum of fifteen thousand dollars.

Another of the said negligences & omissions was as follows: One D. C. Wickam who was not only a man of no financial credit but was of notoriously bad repute and had a well-known criminal record, borrowed of the bank divers large sums of money on his promissory notes, worthless acceptances, & overdrafts to the extent in all of about $45,000. Said notes, acceptances & overdrafts were secured only to the extent of about $10,000. Wickam made entire default in payment, & by its transactions with him the bank lost about $35,000.

That by divers other like careless, unbusinesslike and improvident loans & transactions the said cashier misused & lost divers other sums of money belonging to the bank, amounting in the aggregate to about $50,000 more.

That by one of the aforesaid unbusinesslike & improvident loans, transactions one Chown, a dealer in stoves obtained large sums of money from the bank, without adequate security, and thereby the bank lost about $12,000. That by another of the said im-
17 provident & unbusinesslike transactions one J. T. Cochran, a man of no good credit or commercial standing, obtained at various times from the cashier large sums of money, and about $7,000 thereof has not been repaid, but is hopelessly lost to the bank. That another of the said improvident transactions took place between the cashier and one R. W. Snow. Said Snow was also a man of no capital or good financial rating & through its transactions with & advances to him the bank lost about $6,000. That through & by means of the aforesaid losses resulting from the transactions of the bank with Wickam, Snow, Cochran & Chown alone the capital and surplus of the bank became reduced from $230,000 to about $170,000, and that the said sum of about $170,000 suffered a still further diminution of more than $120,000 and the reduction to about $50,000 by the transactions held as aforesaid with Woodard & Gutman and the reduction of the capital and surplus to said sum of about $50,000 irrespective of other losses rendered it necessary for the bank to suspend payment & go into insolvency and for a receiver to be appointed as hereinafter set forth; and the entire loss on the capital & surplus of about $230,000 & the levy of an
18 assessment of $75,000 hereinafter referred to was the direct and inevitable result of the losses aforesaid, which as hereinbefore detailed resulted from the negligence of the said executive committee. That the loss on the transactions with the said Wickam exceeded in amount the surplus of the bank, and impaired the capital, and after said capital was so impaired the transactions with Woodard & Gutman caused a sudden withdrawal of the cash of the bank to the extent of about $143,000, and consequently said losses on the Wickam, Woodard & Gutman transactions alone & irrespective of any other losses rendered necessary the suspension of the bank, the loss of the capital stock & surplus thereof

& the levy of an assessment and sacrifice of assets thereof hereafter referred to.

That said president, vice-president & executive committee easily could & should have prevented the occurrence of each & all of the said improvident uses of the moneys of the bank by giving attention to & discharging the duties of their said trust, & had they done so none of said losses and improvident uses of money would have occurred, but defendants Thomas, Thompson and Wilson ut-

19 terly neglected their duty in the premises and wilfully neglected to take any care or exercise any supervision of the officials and business of the bank, but negligently permitted the said cashier to do as he pleased with and misuse, waste and lose the moneys of the bank, &, by reason of their negligence & omissions of defendants Thomas, Thompson and Wilson, and not otherwise, each and all of the said losses of the corporation occurred.

That apart from the negligent & careless conduct of the business and the resulting losses hereinbefore mentioned, the corporation did a good business & its profits ought to and would have been very large & a surplus had been accumulated in the less than two years of the existence of the bank of upwards of $30,000, which with the other assets above referred to was lost by the aforesaid improvident loans &c. of the cashier and the aforesaid negligence of defendants Thomas, Thompson and Wilson.

That by reason of the negligence of said defendants and the acts and misconduct of the cashier negligently permitted as aforesaid, the bank suddenly failed on the 15th day of December, 1888, became insolvent, & it closed its doors and stopped doing business.

20 At the time of said failure and stoppage of business the bank owed large sums of money, aggregating about $450,000 to divers persons who were depositors of money in said bank.

That of each and all of the facts hereinbefore recited of the failure, suspension and stoppage of business of said corporation, the California National Bank of San Francisco, the Comptroller of the Currency of the United States was duly notified and informed. The said comptroller thereupon made due investigation and examination of the condition of the business and affairs of the corporation defendant herein, the said national banking association, and by the investigation and examination aforesaid, he, the said officer, the Comptroller of the Currency of the United States, became fully satisfied of the foregoing facts, to wit: That the corporation was insolvent, that its capital stock was lost, that it had closed its doors, stopped business and failed and thereupon, being so satisfied, the said comptroller appointed as receiver, said S. P. Young, and said Young duly proceeded to close up the association according to law.

21 That said defendant, S. P. Young still remains such receiver and as such has possession of all of the assets of the bank and upon his information and belief, plaintiff alleges:

That to realize from and promptly turn into money the assets of the bank and to pay its depositors the receiver has been compelled

to and he to some extent has sacrificed the assets of said bank, to wit: to the extent of between twenty and thirty per cent. of the assets thereof, and thereby the corporation has lost between twenty and thirty per cent. of its said assets.

That the comptroller in order to pay the debts of the bank has been obliged to and has levied an assessment of $75,000, upon the stockholders thereof, all of which has been collected except about $20,000 due upon the stock held by the defendant Richard P. Thomas.

That the defendants Thomas, Thompson and Wilson are financially responsible and able to make good the losses which have resulted to said corporation by reason of their said negligence, and a judgment against them for the entire amount of such losses can be made and collected.

That the plaintiff has requested the said corporation and
22 its board of directors to bring suit against said Thomas, Thompson and Wilson for the amount of money which the corporation has lost by their negligence, but said corporation and its board of directors neglect and refuse and have always neglected and refused, to bring such, or any suit or legal procedure, or to take any action whatever in the premises, and no action of the kind, or at all in the premises, has been brought, and therefore, because of such neglect and refusal to act, by said corporation and its board of directors, this plaintiff, for the corporation, brings this present action making said corporation a defendant thereto.

That this plaintiff has requested the said receiver, S. P. Young, as such receiver, for the corporation, to bring and prosecute to final judgment, suit against the above-mentioned Richard P. Thomas, Robert R. Thompson and Robert A. Wilson, the president, vice-president and executive committee, as above mentioned, for the amount of money lost by reason of the negligence of said trustees, as is hereinbefore recited; but the said receiver neglects and refuses and has always neglected and refused, to bring such, or any, suit
or legal procedure, or to take any action whatever in the
23 premises, and no action in the premises has been brought, and therefore, because of such neglect and refusal to act by the receiver, he and the said corporation are made a defendant hereto.

That this plaintiff has requested the Comptroller of the Currency of the United States, as such official, for the said corporation to bring and prosecute to final judgment, suit against the above-mentioned Richard P. Thomas, Robert R. Thompson and Robert A. Wilson, the president, vice-president and executive committee, as above mentioned, for the amount of money lost by reason of the negligence of said trustees as is above recited, but the said comptroller neglects and refuses and has always neglected and refused to bring such, or any, action whatever in the premises, and no action whatever in the premises has been brought, and therefore the said corporation is made a defendant hereto.

Wherefore, this plaintiff prays for a decree herein that the said trustees, the above named defendants, Richard P. Thomas, Robert

R. Thompson and Robert A. Wilson be held to an account-
24 ing of their said trust; that they restore unto said corporation the sum of $400,000 (with legal interest thereon from the time of such loss) so as aforesaid lost by their negligence. That a joint and several money judgment against them, the said Richard P. Thomas, Robert R. Thompson and Robert A. Wilson, for the sum of $400,000, with legal interest thereon from the time of such loss, and costs herein be rendered and entered by this court in this case in favor of said corporation, the California National Bank of San Francisco, and that said corporation, and this plaintiff do have such further order, decree, judgment and relief as may be meet and agreable to equity.

JOHN CHETWOOD, JR.,
In Propria Persona.
THOMPSON & THOMPSON,
Attorneys for Plaintiff.

(Duly verified.)
Filed January 10, 1893.

Demurrer of Defendant Thomas.

(Title of Court and Cause.)

25 Now comes the defendant, R. P. Thomas, by H. D. Talcott, his attorney, and demurs to the amended complaint of plaintiff herein upon the following grounds, to wit:

I.

That this court has no jurisdiction of the persons of any of the parties of this action.

II.

That this court has no jurisdiction of the subject-matter of this action.

III.

That said complaint is uncertain in the following particulars:

a. It cannot be ascertained therefrom who were the "divers irresponsible persons" to whom the cashier therein mentioned, is alleged to have lent large sums of money with no adequate security, or what "unauthorized, unsecured and valueless bills of exchange" said cashier bought, or on what "informal promises and pretended securities" said cashier made such loans or purchases.

b. It cannot be ascertained therefrom what were the "divers other like careless and unbusinesslike and improvident loans and
26 transactions" by which said cashier is alleged to have misused and lost divers sums of money belonging to said bank, and amounting in the aggregate to about $50,000, or when said loans and losses were made.

c. It cannot be ascertained in what manner one Chown therein mentioned obtained large sums of money from the bank without

adequate security, or wherein said cashier or this defendant was negligent or committed any breach of duty in said transaction.

d. It cannot be ascertained in what manner one J. T. Cochran therein mentioned obtained large sums of money from the bank without adequate security, or wherein said cashier or this defendant was negligent or committed any breach of duty in said transaction.

e. It cannot be ascertained in what manner one R. W. Snow obtained a large sum of money from the bank without adequate security, or through what transactions with and advances to him the bank lost said sum or wherein said cashier or this defendant was negligent or committed any breach of duty in said transaction.

IV.

That said complaint does not state facts sufficient to constitute a cause of action.

27

V.

That said complaint does not contain a statement of any facts sufficient to constitute any cause of action against this defendant.

VI.

That said complaint does not state facts sufficient to constitute a cause of action in this, that the plaintiff alleges in his complaint that he demanded the corporation defendant to institute this action against the defendants' officers of said corporation to recover the gross sum of $400,000 lost by the corporation as stated in the complaint; $200,000 of which loss is therein alleged to have been incurred under such circumstances as not to be the natural consequences of any loans of any of the defendants, and such damages are remote and not proximate and could not be legally recovered.

VII.

That the complaint does not state facts sufficient to constitute a cause of action in this, that the complaint shows that no recovery could have been, or can be had for any part of the $200,000 damages claimed in the complaint on account of the loss of the

28 good will of the business of said corporation, and on account of the acts or omission of the receiver in the management or disposal of the assets of said corporation.

VIII.

That said complaint does not state facts sufficient to constitute a cause of action in this, that the complaint shows that defendant Young, under and in pursuance of the act of Congress under which this corporation was organized as a national banking corporation, was appointed receiver of and for said corporation, and that he was and is yet such receiver and acting as such and was acting as such at the time when demand was made upon said corporation to bring this suit, and at the time when this suit was brought, and no right

to bring this action at either of said times existed on the part of this defendant for the redress of any of the wrongs alleged in said complaint.

IX.

That said complaint does not state facts sufficient to constitute a cause of action in this, that the demand of plaintiff upon the receiver, and his refusal to institute this suit created no right, nor conferred any authority upon the plaintiff to bring this suit, nor furnished any justification to him in bringing the same.

X.

That said complaint does not state facts sufficient to constitute a cause of action in this, that after the appointment of a receiver for a national bank and during his incumbrancy of his office as such, neither a demand made upon him by a stockholder of such bank to institute a suit such as this, nor his refusal so to do, creates or confers any right or authority upon such stockholder to institute the same.

XI.

That said complaint does not state facts sufficient to constitute a cause of action in this, that during the time that the affairs of such a corporation as this defendant are in course of liquidation in pursuance of the act of Congress under which it was organized, all of its affairs and interests, including causes of action such as those embraced in this suit are by law committed to the exclusive charge and control or the Controller of the Currency of the United States, and of such receiver as may have been appointed, and are beyond any interference of right of interference on the part of any stockholder of the corporation in this court by action or otherwise.

XII.

That said complaint does not state facts sufficient to constitute a cause of action in this, that there is no averment in said complaint of authorization by the Controller of the Currency to bring this or any action.

January 12, 1893.

H. D. TALCOTT,
Attorney for Defendant R. P. Thomas.

Filed January 12, 1893.

Demurrer of Defendant The California National Bank of San Francisco.

(Title of Court and Cause.)

Now comes the defendant, The California National Bank of San Francisco, *et al.*, and demurs to the second amended complaint of plaintiff herein upon the following grounds, to wit:

31

I.

That this court has no jurisdiction of the persons of any of the parties of this action.

II.

That this court has no jurisdiction of the subject-matter of this action.

III.

That said complaint is uncertain in the following particulars:

a. It cannot be ascertained therefrom who were the "divers irresponsible persons" to whom the cashier therein mentioned, is alleged to have lent large sums of money with no adequate security, or what "unauthorized, unsecured and valueless bills of exchange" said cashier bought, or on what "informal promises and pretended securities" said cashier made such loans or purchases.

b. It cannot be ascertained therefrom what were the "divers other like careless and unbusinesslike and improvident loans and transactions" by which said cashier is alleged to have misused and lost divers sums of money belonging to said bank, and

32 amounting in the aggregate to about $50,000, or when said loans and losses were made.

c. It cannot be ascertained in what manner one Chown therein mentioned obtained large sums of money from the bank without adequate security, or wherein said cashier or this defendant was negligent or committed any breach of duty in said transaction.

d. It cannot be ascertained in what manner one J. T. Cochran therein mentioned obtained large sums of money from the bank without adequate security, or wherein said cashier or this defendant was negligent or committed any breach of duty in said transaction.

e. It cannot be ascertained in what manner one R. W. Snow obtained a large sum of money from the bank without adequate security, or through what transactions with and advances to him the bank lost said sum or wherein said cashier or this defendant was negligent or committed any breach of duty in said transaction.

IV.

That said complaint does not state facts sufficient to constitute a cause of action.

33

V.

That said complaint does not contain a statement of any facts sufficient to constitute any cause of action against this defendant.

VI.

That said complaint does not state facts sufficient to constitute a cause of action in this, that said complaint does not contain a statement that plaintiff ever demanded or requested this defendant to institute any action against any officers of said corporation to recover any amount lost to said corporation by reason of the loss of the good

will of its business, nor to recover any sum lost by reason of the defendant Young as receiver disposing of the assets of said corporation for less than the same would have realized had not such bank suspended or failed.

VII.

That said complaint does not state facts sufficient to constitute a cause of action in this, that the plaintiff alleges in his complaint that he demanded the corporation defendant to institute this action against the defendants' officers of said corporation to recover
34 the gross sum of $400,000 lost by the corporation as stated in the complaint; $200,000 of which loss is therein alleged to have been incurred under such circumstances as not to be the natural consequences of any loans of any of the defendants, and such damages are remote and not proximate and could not be legally recovered.

VIII.

That the complaint does not state facts sufficient to constitute a cause of action in this, that the complaint shows that no recovery could have been, or can be had for any part of the $200,000 damages claimed in the complaint on account of the loss of the good will of the business of said corporation, and on account of the acts or omission of the receiver in the management, or disposal of the assets of said corporation.

IX.

That said complaint does not state facts sufficient to constitute a cause of action in this, that the complaint shows that defendant Young, under and in pursuance of the act of Congress under which this corporation was organized as a national banking corporation, and that he was and is yet such receiver and acting as such
35 and was acting as such at the time when demand was made upon said corporation to bring this suit, and at the time when this suit was brought, and no right to bring this action at either of said times existed on the part of this defendant for the redress of any of the wrongs alleged in said complaint.

X.

That said complaint does not state facts sufficient to constitute a cause of action in this, that the demand of plaintiff upon the receiver, and his refusal to institute this suit created no right, not conferred any authority upon the plaintiff to bring this suit, nor furnished any justification to him in bringing the same.

XI.

That said complaint does not state facts sufficient to constitute a cause of action in this, that after the appointment of a receiver for a national bank, and during his incumbrancy of his office as such, neither a demand made upon him by a stockholder of such bank to

institute a suit such as this nor his refusal so to do, creates or confers any right or authority upon such stockholder to institute the same.

36 XII.

That said complaint does not state facts sufficient to constitute a cause of action in this, that during the time that the affairs of such a corporation as this defendant are in course of liquidation in pursuance of the act of Congress under which it was organized, all of its affairs and interests including causes of action such as those embraced in this suit are by law committed to the exclusive charge and control of the Controller of the Currency of the United States, and of such receiver as may have been appointed, and are beyond any interference or right of interference on the part of any stockholder of the corporation in this court by action or otherwise.

XIII.

That said complaint does not state facts sufficient to constitute a cause of action in this, that there is no averment in said complaint of authorization by the Controller of the Currency to bring this or any action.

January 12, 1893.

H. D. TALCOTT,
Attorney for Defendant The California National Bank.

Filed January 12, 1893.

37 *Demurrer of Defendant Thompson.*

(Title of Court and Cause.)

The defendant R. R. Thompson demurs to the last-amended complaint of the plaintiff herein upon the grounds following, to wit:

1.

That the court has no jurisdiction of the subject of the action.

2.

That the complaint does not state facts sufficient to constitute a cause of action.

3.

That several causes of action have been improperly united, to wit: An individual cause of action in favor of plaintiff personally is improperly united in said amended complaint with a cause of action in favor of plaintiff as the representative of all of the stockholders of the corporation called the California National Bank of San Francisco, and in both capacities plaintiff seeks to recover a judgment against defendants herein.

4.

38 That said complaint is ambiguous in this: It is alleged herein that the plaintiff, "individually and as the representative of all the stockholders of the corporation called the California National Bank of San Francisco, for the benefit of the said corporation, files this bill of complaint herein and alleges;" hence it is ambiguous in that it cannot be told therefrom whether the plaintiff is suing for the redress of the wrong done him individually or the wrong done the corporation.

5.

The said complaint is uncertain in that there is contained therein the language quoted and set out in the ground of demurrer last above stated in that it is uncertain whether the plaintiff is suing to redress a wrong done to him individually or to redress a wrong done to the corporation mentioned.

6.

The said complaint is further demurred to upon the ground that the same is uncertain in this: In said complaint the following language occurs: "but wholly disregarding the same and contriving together to injure and deceive the said corporation, neglected
39 and omitted, without any reasonable excuse, to exercise their own skill, care, judgment and discretion in the making of loans and discounts out of the moneys in the possession of the said bank and otherwise directing the business of said bank, but they negligently permitted the cashier of said bank to control and manage the whole business of said bank as he saw fit, and without consulting or in anywise informing said defendants or any or either of them, to lend the moneys of the said bank according to his own pleasure, to buy bills of exchange without any consultation with said defendants or any or either of them, and in such manner as he, the said cashier, elected, to dispose of all the moneys of said bank, and the said cashier, of his own will and without direction or attempted direction of or by said defendants or any or either of them lent out of the moneys of said bank large sums of money to divers irresponsible persons with no adequate security & bought unauthorized, unsecured & valueless bills of exchange, & on informal promises & pretended securities which were of little or no value, & such as were not usual in bank dealing nor capable of discount nor well approved in banking securities nor safe securities for any bank to take, or well adapted to preserve the capital stock
40 thereof; all of which said loans, notes, drafts & bills of exchange were and are wholly valueless & unpaid & cannot in anywise be realized upon."

"That by such negligence, worthless loans & the various transactions above mentioned the moneys of the corporation were wasted, misused & lost, as this plaintiff is informed & believes & on his information & belief alleges, at the time of the failure of the bank hereinafter referred to, to a sum & amount of about $200,000 that

to this plaintiff the entire details of the misuse of the money of the bank are unknown."

That it is uncertain therefrom what worthless loans or transactions resulted in a loss to the said bank of the sum of $200,000 in that no designation of amounts of the respective losses of the persons to whom such loans were made or by which such losses were sustained is stated therein. The said language is further uncertain in that it cannot be told therefrom what act the defendants contrived together to do or omit to do in order to deceive or injure the said corporation.

41

7.

The said complaint is demurred to upon the grounds that the same is uncertain in this. In said complaint is contained this language: "That by divers other like careless, unbusinesslike and improvident loans & transactions the said cashier misused & lost divers other sums of money belonging to the bank amounting in the aggregate to about $50,000 more." That said language is uncertain in that it cannot be told therefrom what such other like careless, unbusinesslike or improvident loans or transactions had by the said cashier resulted in such loss of $50,000 and such matter is not stated with such certainty as will enable these defendants to answer the same.

8.

The said complaint is further demurred to upon the ground that the same is uncertain in this: It is alleged in the said complaint that by reason of the negligence of the defendants the corporation bank lost the sum of $400,000 but there is only stated the particulars of the losses mentioned, Woodard, Gutman, Wickam, Snow, Cochran and Chown losses, which as stated do not aggregate

42 the sum which it is alleged the bank lost by reason of such negligence.

9.

The said complaint is demurred to upon the ground that the same is unintelligible in this: It cannot be told therefrom upon what state of facts plaintiff claims that these defendants are liable for any other loss sustained by said bank other than those enumerated in the seventh ground of demurrer last above stated. It is further unintelligible in that there is alleged a loss of from 20 to 30 per cent. of the assets of the bank by reason of the receiver being compelled to promptly realize such assets, and there is no allegation in anywise connecting these defendants with such conduct on the part of the receiver, nor is it made intelligible or shown upon what facts these defendants are to be held liable for such loss.

10.

Said complaint is further unintelligible in this: That it is stated therein that the controller in order to pay the debts of the bank

levied an assessment of $75,000 upon the stockholders, and
43 yet there is no allegation connecting these defendants with such act so as in anywise to make them liable therefor.

11.

Said defendants further demurs to all that part of the said amended complaint which predicates the cause of action upon any losses sustained by the said bank other than those losses specified as the Woodard, Gutman and Wickam losses upon the ground that all of such cause or causes of action are barred by the provisions of section 339, subdivision one, of the Code of Civil Procedure of this State, and in that said amended complaint was not filed within two years after such causes of action accrued.

Wherefore said defendants ask that plaintiff take nothing by his complaint and that defendants have judgment for costs.

BYRON WATERS,
Attorney for Defendant R. R. Thompson.

Filed Jan'y 21, 1893.

44 *Order Overruling Demurrers.*

(Title of Court and Cause.)

IN OPEN COURT, *May* 5, *A. D.* 1893.

In this action the demurrer of the defendants R. R. Thompson, Robert A. Wilson, R. P. Thomas and The California National Bank having been heretofore submitted to the court for consideration and decision and the court having fully considered the same—

It is ordered that said demurrers be and the same are hereby overruled, and said defendants are allowed ten (10) days to answer.

Answer of Defendants Thompson and Wilson.

(Title of Court and Cause.)

The defendants, Robert R. Thompson and Robert A. Wilson for answer to the amended complaint of the plaintiff, show:

Said defendants deny, that at any time *that* as such execu-
45 tive committee or as members thereof, either assumed or had any other supervision of any of the officers or business of said corporation than that imposed upon them by the terms of section 7 of the by-laws of said bank and set out in the amended complaint herein.

Said defendants deny that there ever devolved upon them as members of said executive committee, or that they ever assumed any duty to discount or purchase bills, notes or evidences of debt, or to buy or sell bills of exchange, coin or bullion or loan money on any security or to order, direct or superintend*ent* the acts or proceedings of the cashier, clerks or other employees of said bank or to exercise vigilance in seeing that money or property of the bank were not lost, wasted or misused or to conduct the business of

the corporation at all, or in any such matters to exercise their skill or discretion, or to cause records or books of account to be kept, or to examine them or vouchers, or to see that the moneys of the bank were not lent to irresponsible persons or upon inadequate security, or upon security not conforming to bank usage or otherwise irregular or to see that in the purchase of bills of exchange or
46 drafts, the same were secured or safe or sure to be honored or paid, or to see that any such loans conformed to bank usage or the rules of safe banking, except as required by said by-law 7.

Said defendants deny that there was ever imposed upon them as such executive committee, or that they as such or at all ever assumed any duty to exercise any other diligence or fidelity in the performance of any duty to said bank, other than that provided for in section 7 of the by-laws of the bank.

Said defendants deny that either of them either accepted or retained or assumed any trust or duty unto the said corporation other than those imposed by the terms of said section 7 of the by-laws, or that they or either of them promised to discharge any other duty or perform any other act or thing in the premises as members of said executive committee other than those duties imposed upon them by the terms of said by-laws.

And said defendants deny that the said corporation ever confided in said defendants as members of the said executive commit-
47 tee or entrusted unto them the performance or discharge of any other duties as such executive committee than those duties specified in said section 7 of the by-laws of the said corporation.

That at the same time section 7, 17 and 18 of the by-laws of the said banking corporation were adopted ,there was also adopted as section 19 of such by-laws, a by-law fixing the powers and duties of the cashier of the said banking corporation, which is as follows, to wit:

SEC. 19. "The cashier shall keep a record of all proceedings of meetings of the directors and stockholders. He shall, when requested by the president or two directors, cause notices to be given of all meetings of the board of directors and of the stockholders. He shall countersign all certificates of stock, all receipts for circulating notes received from the Comptroller of the Currency; he shall promptly and accurately prepare and forward all reports and perform all acts required by the laws of the United States or regulations of the Treasury Department. He shall sign or countersign, and when necessary affix the seal of the bank to all contracts, deeds, evidences of debt and other instruments in writing which
48 are necessary and proper in the transaction of the ordinary business of the bank, or which have been approved by the board of directors and do all acts required by said board. He may under the direction and with the concurrence of the president discount bills, notes or other evidences of debt and make loans under the same restrictions as the president; issue and sign certificates of deposit; draw checks and warrants upon the bank in the ordinary

and usual course of its business and pay the current expenses of the bank when approved by the executive committee. He shall keep the stock certificate book and transfer book and see that the proper entries are made therein. He shall also have supervision and custody of all records, minutes, papers, books, vouchers, notes, bonds, evidences of indebtedness, and securities of the bank, unless otherwise specially directed by the board of directors; and shall be responsible for all moneys, funds, and valuables belonging to or deposited with the bank, and shall account for and deliver the same upon the order of the board of directors, or to any person authorized to receive them. He shall make such statements of the condition finances and business of the bank to the directors and
49 stockholders as may from time to time be required of him by the president or board of directors. He shall give bond with security to be approved by the board of directors, in the sum of ten thousand dollars for the faithful discharge of his duties."

And at the same time there was adopted by said corporation another by-law, authorizing the appointment of an auditing committee, and defining its duties, which by-law is numbered section 24 and is as follows, to wit:

SEC. 24. "There shall be appointed by the board of directors a committee of three members whose duty it shall be to examine at such time as they shall see fit, but as often as every three months, the affairs of the bank, count its cash and compare its assets and liabilities with the accounts of the general ledger, ascertain whether the accounts are correctly kept and the condition of the bank corresponds therewith and whether the bank is in a sound and solvent condition and to recommend to the board such changes in the manner of doing business and otherwise as shall seem to be de-
50 sirable: the result of the examination shall be reported to the board at its next regular meeting thereafter."

That from and after the adoption of said by-laws so prescribing the duties of the respective officers and committees of the said banking corporation, each of the said officers and committees assumed and during the continuance of the operation and doing of business by the said bank as such, each of the said officers and committees took upon themselves and entered upon the discharge of the duties imposed upon them respectively by the law and such by-laws.

Said defendants deny that they or either of them ever contrived together or with any person in anywise to injure or deceive the said corporation or that they or either of them ever neglected or omitted to exercise their or his own skill, care, judgment or discretion in the making of loans or discounts of the moneys of said corporation or in anywise directing the business of said bank, or that they or either of them ever permitted the cashier of said bank to control or in anywise manage any of the business of said bank, and said defendants and each of them deny that they permitted said
51 cashier without consulting or informing them or either of them to lend any of the moneys of said bank according to his pleasure, or to buy bills of exchange without any consultation with said defendants or either of them or in any manner to dispose

of any moneys of the said bank of his own will or without direction or attempted direction of or by said defendants.

And said defendants upon information and belief deny that the said cashier let out any of the moneys of the said bank to any irresponsible persons upon inadequate security, or bought any unauthorized or unsecured or valueless bills of exchange, or upon informal promises or pretended securities, or such as were of little or no value, or such as were not usual in bank dealing or that any of said loans, notes, drafts or bills of exchange were wholly valueless.

Said defendants deny that there was any waste, misuse or loss of any of the funds or moneys of the said corporation by or through any negligence of either of these defendants, and they deny that any loss or waste or misuse of any of the funds of said bank were ever caused by any act done or omitted to be done by these defendants or either of them.

52 For answer to that part of the amended complaint, which relates to the transactions and dealings had between said bank and the Alameda County Railway Company and J. H. Woodard, said defendants, on information and belief, deny that said Daniel McAwley was a man of no capital or was not of good financial standing or that said drafts were unsecured or that the drawee thereof had no credit or means or standing commensurate with the amount of said drafts, or that to buy them was injudicious or inconsistent with banking principles or reckless or wrong.

Said defendants deny that any loss accruing to the said bank by reason of any of the said transactions with the said Woodard or said railway company, was in anywise caused by any negligence on the part of either of these defendants.

Said defendants on information and belief deny, that any moneys of the said bank advanced to David Gutman upon the discount of any drafts were not secured to be repaid to the said bank, and said defendants deny that any loss sustained by said bank by reason thereof was in anywise caused by any negligence on the part of either of these defendants.

53 Said defendants on information and belief deny, that at the time when the claim of said bank against D. C. Wickam accrued, that the said Wickam was a man of no financial credit, or that he was of bad repute or had a known criminal record, and deny that any claims of said bank against said Wickam were unsecured for any part thereof.

Said defendants deny that any loss sustained by said bank, through or by reason of any claims against said Wickam, was in anywise caused by any negligence or omission on the part of either of these defendants.

The said defendants state that they have no information or belief upon the subject sufficient to enable them or either of them to answer that allegation of the complaint that "by divers other careless, unbusinesslike and improvident loans and transactions, the said cashier misused and lost divers other sums of money belonging to the bank amounting in the aggregate to about fifty thousand dollars more," and placing their denial on that ground, said defend-

ants deny that by any careless, unbusinesslike or improvident loans or transactions, the said cashier misused or lost any other sum or sums of money belonging to the bank.

54 As to the transaction by said bank with J. V. Chown, the said defendants on information and belief deny that any sum of money was obtained by the said Chown from the bank without adequate security or that any loss through such transaction sustained by the bank was in anywise caused by any act or negligence on the part of these defendants or either of them.

As to the transaction with J. T. Cochran & Co., mentioned in the complaint as the transaction of J. T. Cochran, said defendants on information and belief deny that the said Cochran was not a man of good credit or commercial standing, or that he obtained by or through any improvident or unbusinesslike transactions with the cashier, any sums or sum of money.

Said defendants on information and belief allege that all sums of money obtained by said Cochran or Cochran & Co., from the said cashier, were adequately secured to be repaid to the said bank; and said defendants deny that any loss accruing to the said bank by reason of the transactions with the said Cochran or Cochran & Co., was caused by any negligence on the part of these defendants or either of them.

55 Said defendants on information and belief deny that R. W. Snow, mentioned in the complaint was a man of no capital or of no good financial rating, or that any transactions that took place between said Snow and the cashier of the bank were improvident transactions.

Said defendants on information and belief, deny, that the said Snow was a man of no capital or of no good financial rating, or that any loss sustained by said bank through any transaction with him was in anywise caused by any negligence on the part of these defendants or either of them.

Defendants on information and belief, deny, that any losses resulting from the transactions of the bank with said Wickam, Snow, Cochran or Chown or Woodward or Gutman, or the Alameda County Railway Company, or Cochran & Company were caused by any negligence on the part of said executive committee or either of these defendants.

Said defendants deny that by the exercise of any care they could, or that by the exercise of ordinary care they would have pre-

56 vented the occurrence of said uses of the moneys of the bank, or that by the giving of any attention to or the discharging of the duties of their office, any of such uses would not have occurred, or that had they done so, any of said losses or uses of money would not have occurred. And said defendants deny that they neglected any duty in the premises, or neglected to take care or exercise supervision of the officials or business of the bank or that they or either of them permitted the cashier to do as he pleased, or misuse or waste or lose the moneys of the bank, or that by reason of any negligence or omission on their part or on the part of either of them, any loss to the said corporation occurred.

Said defendants deny that any of the surplus profits that had accumulated were lost by reason of any negligence on the part of either of these defendants; and said defendants deny that said bank failed or became insolvent, or closed its doors or stopped doing business by reason of any negligence on the part of either of these defendants or by reason of any act of misconduct of the cashier permitted by these defendants or either of them.

Wherefore, defendants ask judgment that plaintiff take
57 nothing, and said defendants have judgment for their costs of suit.

BYRON WATERS,
Attorney for Defendant Robert R. Thompson.
MASTICK, BELCHER & MASTICK,
Attorneys for Defendant Robert A. Wilson.

Duly verified.
Filed June 9, 1893.

Stipulation

That answer of defendants Thompson and Wilson stand as the answer of defendants Thomas and the Cal. Nat. Bank of San Francisco.

(Title of Court and Cause.)

It is hereby stipulated that the answer of the defendants Robert R. Thompson and Robert A. Wilson to the last amended complaint of said plaintiff be deemed to be, stand for and be used as the joint and several answer of said last-named defendants and said above-named defendants in said cause, Richard P. Thomas and
58 The California National Bank of San Francisco, the same as if a verified answer had been served & filed by said defendants Richard P. Thomas and The California National Bank of San Francisco, and each of them, to said last-amended complaint of said plaintiff.

Dated June 12, A. D. 1893.

THOMPSON & THOMPSON,
Att'ys for Pl'ff.

Filed June 14, 1893.

Order of Judgment.

(Title of Court and Cause.)

APRIL 27, 1894.

This cause having been heretofore submitted to the court for consideration and decision and taken under advisement and the court having fully considered the same and being fully informed,

It is ordered by the court that judgment be and the same is hereby entered in favor of the plaintiff and against the defendants Richard P. Thomas, Robert R. Thompson and Robert A.
59 Wilson and in favor of the other defendants herein, and inasmuch as the testimony is unsatisfactory and the court

being unable therefrom to determine the amount for which judgment should be entered,

It is ordered, by the court, that a referee be appointed to take proof on that subject and report to the court (memorandum of opinion filed).

On behalf of all the defendants Messrs. George H. Maxwell and H. D. Talcott in open court duly except to the order referring said matter to the referee.

Order Appointing Referee.

(Title of Court and Cause.)

Whereas after a trial of the above case and the submission thereof for decision the court finds itself in need of further information upon certain issues of said case,

And whereas the taking of an account is necessary for the guidance and information of the court before rendering a final
60 judgment therein, the court hereby appoints T. C. Kierulff, Esq., referee in said case for the following purpose, to wit:

To examine the books, papers, drafts & documents of the California National bank introduced in evidence at the trial of said case for the purpose of ascertaining therefrom & reporting to the court the amount appearing from said books, papers, drafts & documents to have been due and owing to the bank on July 8, 1888, Aug. 6, 1888, and Dec. 15, 1888 from each of the following-described persons, to wit: David Gutman, J. H. Woodward, president of the Alameda County railroad, and D. C. Wickam.

D. J. MURPHY, *Judge.*

June 14th, 1894.

Filed June 15, 1894.

Report of Referee.

(Title of Court and Cause.)

61 Whereas on the 14th day of June, 1894, in the city and county of San Francisco, State of California, the court made an order appointing me, the undersigned, referee in the above-entitled case, which order was in the words and figures following, to wit:

Whereas, after a trial of the above case, and the submission thereof for decision, the court finds itself in need of further information upon certain issues of said case.

And whereas, the taking of an account is necessary for the guidance and information of the court before rendering a final judgment therein, the court hereby appoints T. C. Kierulff Esq. referee in said case for the following purpose to wit: to examine the books, papers, drafts and documents of the California National bank introduced in evidence, at the trial of said case for the purpose of

ascertaining therefrom and reporting to the court the amount appearing from said books, papers, drafts and documents, to have been due and owing to the bank on July 8, 1888, August 6th, 1888 and December 15th 1888, from each of the following-described persons, to wit: Davis Gutman, J. H. Woodward, president
62 of the Alameda County Railroad Company, and D. C. Wickham.

June 14th, 1894.

D. J. MURPHY, *Judge.*

Now, therefor-, in pursuance to the aforesaid order, I do now respectfully report to this honorable court, as follows:

That I have fully and carefully examined the books, papers and documents of said bank, in reference to the indebtedness, upon the dates, and of the persons described in said order.

That I have been attended upon said examinations, by Messrs. Thompson & Thompson, E. S. Pillsbury, att'ys for plaintiff,—and by Messrs. George H. Maxwell and Mastick, Belcher & Mastick, att'ys for defendants.

That it appears from the books, papers and documents of the said California National bank, that the said David Gutman, J. H. Woodard, president of the Alameda County Railroad Co., and D. C. Wickham, the persons described in the order of reference aforesaid,
63 were indebted to the said California National bank, upon the dates therein mentioned, in the following amounts, to wit:

David Gutman, indebtedness July 8, 1888.....	$127 08
" " August 6, 1888.....	4,566 93
" " December 15, 1888.....	70,622 49
J. H. Woodard, president, indebtedness, July 8, 1888..	10,052 54
" " president, indebtedness, August 6, 1888.	30,000 00
" " president, indebtedness, December 15, 1888	75,385 00
D. C. Wickham, indebtedness July 8, 1888.....	19,793 96
(Time, paper maturing after July 8, 1888.....	16,310 50)
D. C. Wickham, indebtedness August 6, 1888	42,939 28
" " " December 15, 1888.....	51,085 42

All of which is respectfully submitted.

T. C. KIERULFF, *Referee.*

August 17, 1894.
Filed Aug. 17, 1894.

Stipulation as to Defendant Thompson.

(Title of Court and Cause.)

64 The above-named plaintiff John Chetwood, Jr., in person and by his attorneys Messrs. Thompson & Thompson and E. S. Pills-ury, Esquire, and the defendant R. R. Thompson by his attorneys George H. Maxwell, Esquire, and Byron Waters, Esquire, hereby stipulates and agree:

First. That the said plaintiff hereby renounces and withdraws his cause of action herein as against the said defendant R. R. Thompson, and that he will not further prosecute the same as against said defendant.

Second. That pursuant to the foregoing renunciation and withdrawal by the plaintiff of his said cause of action, this action be and is hereby dismissed as against the said defendant R. R. Thompson.

Third. That the said plaintiff and the said defendant each pay his own costs incurred and disbursed in this action, and that judgment of dismissal be accordingly entered herein.

Dated, September 13th, 1894.

JOHN CHETWOOD, JR.,
Plaintiff, in Person.

65 THOMPSON & THOMPSON,
E. S. PILLSBURY,
Attorneys for said Plaintiff.
GEO. H. MAXWELL AND
BYRON WATERS,
Attorneys for Defendant R. R. Thompson.

Filed Sept. 24th, 1894.

Stipulation as to Defendant Wilson.

(Title of Court and Cause.)

The above-named plaintiff John Chetwood, Jr., in person, and by his attorneys, Messrs. Thompson & Thompson, and E. S. Pillsbury, Esquire, and the defendant Robert A. Wilson by his attorneys Mastick, Belcher and Mastick, hereby stipulate and agree:

First. That the said plaintiff hereby renounces and withdraws his cause of action herein as against the said defendant Robert A. Wilson and that he will not further prosecute the same as against said defendant.

66 Second. That pursuant to the foregoing renunciation and withdrawal by the plaintiff of his said cause of action, this action be and is hereby dismissed as against the said defendant Robert A. Wilson.

Third. That the said plaintiff and the said defendant each pay his own costs incurred and disbursed in this action, and that judgment of dismissal be accordingly entered herein.

Dated Sept. 13th, 1894.

JOHN CHETWOOD, JR.,
Plaintiff, in Person.
THOMPSON & THOMPSON AND
E. S. PILLSBURY,
Attorneys for said Plaintiff.
MASTICK, BELCHER & MASTICK,
Attorneys for Defendant Rob't A. Wilson.

Filed Sept. 24th, 1894.

Order of Judgment of Dismissal as to Defendants Thompson and Wilson.

(Title of Court and Cause.)

67 The plaintiff John Chetwood, Jr., and the defendants Robert R. Thompson and Robert A. Wilson come into court by their respective attorneys and on motion of the attorneys for the plaintiff, the attorneys for said defendants respectively, consenting thereto, and pursuant to the stipulation signed by the plaintiff in person and by the attorneys for the respective parties, plaintiff and said defendants, now filed in open court by the attorneys for the plaintiff, wherein and whereby the plaintiff renounces and withdraws his cause of action herein as against the said defendants Robert R. Thompson and Robert A. Wilson, and wherein and whereby it is stipulated and agreed that this action be dismissed, as to them and each of them each of said parties paying his own costs,

Now, therefore, it is hereby ordered by the court that this action be and the same is hereby dismissed as against said defendants Robert R. Thompson and Robert A. Wilson, each of said parties paying his own costs, and that judgment of dismissal be entered herein accordingly.

Filed and entered Sept. 24th, 1894.

68 *Judgment of Dismissal as to Defendants Thompson and Wilson.*

(Title of Court and Cause.)

The plaintiff, John Chetwood, Jr., having on this 24th day of September, 1894, by his attorneys, filed in open court stipulations signed by himself in person and by his attorneys, and by the attorneys for the defendants Robert R. Thompson and Robert A. Wilson, respectively, therein and thereby renouncing and withdrawing his cause of action herein, as against the defendants Robert R. Thompson and Robert A. Wilson and each of them, and agreeing that, pursuant to such renunciation and withdrawal, this action should be dismissed as against the said defendants Robert R. Thompson and Robert A. Wilson and that each of the parties, said plaintiff and said defendants, should pay his own costs; and the court, pursuant to said stipulations, and on motion of the attorneys for the plaintiff made in open court, having ordered, on said day, that this action should be and was thereby dismissed as against the said defendants Robert R. Thompson and Robert A. Wilson, and that each of the said parties should pay his own costs.

69 Now, therefore, by reason of the law and the premises, it is hereby considered, ordered and adjudged by the court that this action be and the same is hereby dismissed as against the defendants Robert R. Thompson and Robert A. Wilson and each of them, and that the said plaintiff and the said defendants each pay his own costs incurred and disbursed in this action.

Dated, this 24th day of September, 1894.

Judgment recorded September 24, 1894.

Book 23, page 191.

Findings.

(Title of Court and Cause.)

This cause being duly called for trial, Messrs. Thompson & Thompson and E. S. Pillsbury, Esq., appeared as counsel for plaintiff and Messrs. Mesick & Waters & Maxwell,—Messrs. Mastick, Belcher & Mastick,—and H. D. Talcott, Esq., and A. R. Cotton, Esq., as counsel for the various and respective defendants. And the court having heard all the evidence offered by the parties and duly considered the same and the report of the referee herein and list-
70 ened to the arguments of the respective counsel in the case. And the case having been duly submitted to the court for decision, the court now makes its

Finding of the Facts.

1.

The California National Bank of San Francisco, about the 20th day of October, A. D. 1886, became, it ever since then has been and it now is a national banking corporation, duly organized and existing under the laws of the United States, having a fully paid-up capital stock of two hundred thousand dollars.

At the date of its said organization, the plaintiff—John Chetwood, Jr.—became, he ever since then has been, and he now is a stockholder of and in said bank and in said corporation.

At the said date of its organization, a board of seven directors was duly elected by the stockholders thereof and said seven directors duly accepted office and became the board of directors of said bank and of said corporation.

71 The defendant, Richard P. Thomas was one of the seven directors so elected and he remained and was such director throughout all of the time thereafter herein mentioned.

By the articles of association of said corporation it was duly provided that the board of directors thereof should elect a president, and vice-president and adopt a code of by-laws for the management of said bank.

2.

On said date, the board of directors and the said corporation duly adopted a code of by-laws for said corporation, and the said code of by-laws remained in full force throughout all of the time herein mentioned. Said code of by-laws was in sections which were consecutively numbered. Sections Nos. 7, 17, 18, 19 and 24 were as follows, to wit:

"SEC. 7. There shall be appointed by the board of directors a committee to be known as the executive committee consisting of the president, the vice-president and one or more directors to continue to act till succeeded, who shall have and exercise immediate

supervision of all of the officers and business of this bank:
72 who shall audit all bills for current and other expenses; who shall have power to discount and purchase bills of exchange, coin and bullion, and loan money on personal security; and who shall at each regular meeting of the board of directors make a report of all bills, notes, and other evidences of debt, and to buy and sell bills of exchange, coin and bullion, and loan money on personal security, and who shall at each regular meeting of the board of directors make a report of all bills, notes and other evidences of debt discounted or purchased by them for the bank, and of current and other expenses audited since their last previous report.

SEC. 17. The president shall have general control, and supervision of the affairs of the bank; he shall sign all certificates of stock, all receipts for circulation notes received from the Comptroller of the Currency and shall also have authority to sign all contracts, evidences of debt and other instruments proper and necessary in the ordinary course of business of the bank or which have been approved by the board of directors. He shall have power and authority to discount bills, notes, or other evidences of debt and make loans not exceeding ten thou-
73 sand dollars to any single individual, firm or corporation; buy and sell exchange, sign certificates of deposit and draw warrants and checks upon the bank. He shall be responsible for all sums of moneys and personal property of every kind which may be entrusted to his care or come under his control as president; and he shall pay over the same and deliver the same upon the order of the board of directors, or to any person who may be authorized to demand and receive the same. He shall call special meetings of the board of directors and of the stockholders whenever the interests of the bank shall require, or whenever requested by two directors. He shall perform all duties required of him by the banking laws of the United States, or by its proper officers, and shall see that all reports are promptly and accurately made and forwarded. He shall give bond in the sum of ten thousand dollars, with security to be approved by the board of directors for the faithful discharge of his duties. He shall also prepare and present to the stockholders at their annual meeting such a statement of the property and business of the bank for the preceding year, as will enable them to understand fully the financial
74 condition and prospects of the bank. He shall also have the supervision of all employees of the bank and may suspend them when necessary, reporting his action and the occasion thereof to the board of directors, at its next meeting.

SEC. 18. The vice-president shall assist the president in the discharge of his duties, and in the absence or inability of the president, he shall perform all the acts, exercise all the powers and be subject to the same liabilities as that officer. He shall give bond in the sum of ten thousand dollars, with security to be approved by the board of directors, for the faithful discharge of his duties.

SEC. 19. The cashier shall keep a record of all proceedings of meetings of the directors and stockholders. He shall, when re-

quested by the president or two directors, cause notices to be given of all meetings of the board of directors and of the stockholders. He shall countersign all certificates of stock, all receipts for circulating notes received from the Comptroller of the Currency; he shall, promptly and accurately prepare and forward all reports, and perform all acts required by the laws of the United States, or
75 regulations of the Treasury Department. He shall sign or countersign and when necessary, affix the seal of the bank to all contracts, deeds, evidences of debt and other instruments in writing which are necessary and proper in the transaction of the ordinary business of the bank, or which have been approved by the board of directors and do all acts required by said board. He may under the direction and with the concurrence of the president, discount bills, notes or other evidences of debt and make loans under the same restrictions as the president; issue and sign certificates of deposit; draw checks and warrants upon the bank in the ordinary and usual course of its business and pay the current expenses of the bank when approved by the executive committee. He shall keep the stock-certificate book and transfer book and see that the proper entries are made therein. He shall also have supervision and custody of all records, minutes, papers, books, vouchers, notes, bonds, evidences of indebtedness and securities of the bank unless otherwise specially directed by the board of directors; and shall be responsible forlall moneys, funds and valuables belonging to or
76 deposited with the bank, and shall account for and deliver the same upon the order of the board of directors, or to any person authorized to receive them. He shall make such statements of the condition, finances and business of the bank to the directors and stockholders as may from time to time be required, by the president or board of directors, of him. He shall give bonds with security to be approved by the board of directors in the sum of ten thousand dollars, for the faithful discharge of his duties.

SEC. 24. There shall be appointed by the board of directors a committee of three members, whose duty shall be to examine at such time as they shall see fit, but as often as every three months the affairs of the bank, count its cash and compare its assets and liabilities with the accounts of the general ledger, ascertain whether the accounts are correctly kept and the condition of the bank corresponds therewith and whether the bank is in a sound and solvent condition and to recommend to the board such changes in the manner of doing business and otherwise as shall seem to be desirable; the result of the examination shall be reported to the board at its next regular meeting thereafter."

77 3.

Upon organization of the board of directors, said board duly proceeded to the election of officers, and defendant, Richard P. Thomas, was elected president and Robert A. Wilson, vice-president, and they remained and were such officers during and throughout all the time hereinafter mentioned.

As president of said corporation and of said bank, said Richard

P. Thomas immediately upon and after the organization aforesaid, assumed and entered upon the discharge of the duties of his said office and, in accordance with said code of by-laws, and specially in pursuance of section seventeen thereof above recited and prescribing his duties as such president, he the said Richard P. Thomas, took, assumed and had general control and supervision of the affairs of the bank, with authority and power as set forth in said by-laws, and on him devolved the duty of seeing that the money of said bank was not wasted or misused, and to use his own skill, and discretion in conducting the affairs and business of the bank.

He was, for his services allowed and paid a regular salary
78 during and throughout all of the time of his incumbency of said office. He was well aware of the nature of said trust, the duties of his said office so as aforesaid imposed on him by said by-laws and accepted said duties and received said salary with full knowledge in the premises.

Said corporation and said board of directors fully relied on and confided in his fidelity and diligence and, so relying and confiding, said corporation and its board of directors entrusted him, the said Richard P. Thomas, with the charge of said bank and the duties aforesaid as president, under said by-laws and their above-recited provisions.

Under direction and supervision of said defendant Richard P. Thomas as president, the business of the bank was begun and for a time properly conducted and the bank accumulated a surplus fund of $30,000, over and above its $200,000 capital; but for a considerable period of time prior to the report of the auditing committee hereinafter mentioned, said defendant, Richard P. Thomas, omitted without any reasonable excuse to give reasonable care and
79 attention to the duties of his office and permitted the cashier to manage the business of the bank as he saw fit, without information to or consultation with said president.

Under said by-laws as above shown, provision was made for an auditing committee consisting of three directors whose duty was to examine and report at least once in every three months to said board of directors the general condition of the bank and to recommend to the board such changes in the manner of doing business and otherwise, as shall seem desirable. Upon the organization of said board and adoption of said by-laws, the auditing committee was duly elected.

Prior to July 8th, 1888, said auditing committee examined the condition of the bank, bringing forward its various accounts to the end of the quarter ending June 30th, 1888, and made a report in writing, to said board, duly signed by all the members of said auditing committee; said report being dated July 8th, 1888, and filed on the 6th day of August, 1888. While said report was in the course of being prepared, many warnings of the condition of the bank were orally given to the president, the
80 said Richard P. Thomas. In and by said report it was charged that large loans and discounts had been made which were unauthorized and improper; that the president professed to

have no knowledge of the daily transactions of the bank nor supervision of its affairs; that the vice-president found himself overruled and powerless, while the cashier absorbed the functions of the president and that the auditing committee in the course of its examination had seen enough to cause it to fear that very considerable losses were likely to occur from failure to observe the safes rules carefully laid down in the by-laws for the conduct of business, losses which might otherwise be avoided.

5.

The attention of said president, the defendant herein Richard P. Thomas, was duly drawn to said report and matters therein commented on at and for a considerable time before its date; but he, the said defendant Richard P. Thomas, president as aforesaid still neglected and omitted without any reasonable excuse to exercise his skill, care, judgment or discretion in the conduct of the bank's business and neglected to give reasonable and proper attention thereto but negligently permitted the cashier to manage the
81 business of the bank without the knowledge or direction of or consultation with him, the defendant Richard P. Thomas, president as aforesaid; and to loan the moneys of the bank according to his own pleasure and particularly to make the loans hereinafter specified and to buy bills of exchange on insufficient security and in such manner as he saw fit to dispose of the moneys of said bank without the knowledge of him, the said president, or of said executive committee, or of any or either of its members. By reason of said neglect of the president, the said cashier, without the direction or attempted direction of the president, vice-president, executive committee or any or either of them, loaned out the moneys of the bank in large sums to divers irresponsible persons with no adequate security, and bought unsecured and valueless bills and notes and made loans on informal promises and pretended securities of little or no value. By said negligence of the said president, the defendant Richard P. Thomas, worthless loans and transactions, the moneys of the bank were wasted and lost and the said losses caused the failure of the bank hereinafter mentioned.

82 8.

One of the improper uses of said moneys was as follows, to wit: One J. H. Woodard representing a corporation known as the Alameda County Railroad Co. had dealings with the bank through said cashier. Neither the said Woodward nor his corporation were of any financial standing, reputation or possessed property, as was well known to said president. He the said president on several occasions had been cautioned against said Woodard because of his unreliability. He the said Woodard offered to said cashier, at different times between May 7th, 1888, and the failure of said bank, his drafts to a large amount on one Daniel Macauley who was a person of no financial standing; said drafts were not secured; to buy said drafts was entirely inconsistent with banking principles

reckless and wrong, but the said cashier bought said drafts, these drafts were dishonored and not paid and by reason of the premises, the bank lost $68,500.

9.

Another improper use of the bank's funds was as follows, to wit:
One David Gutman, who was also a person of no good financial standing, as was well known to the defendant Richard P. Thomas, who had been warned against him as an unsafe borrower, offered the said cashier his drafts for large sums, in the aggregate $67,000. The drawee was irresponsible, said drafts were dishonored, and they were dangerous and the purchase thereof was inconsistent with good banking, but the cashier bought them. They were dishonored, only $15,000 could be realized upon them and the balance due thereon was entirely lost to the bank.

10.

Another improper use of the bank's funds was as follows, to wit: One D. C. Wickham who was not only a person of no financial standing, but was of notoriously bad repute,—and of whose financial standing and that he was not a safe or proper man to loan money to, said president of the bank, the above-named defendant, Richard P. Thomas, was warned,—borrowed of the bank by connivance with the cashier, divers large sums of money on promissory notes, overdrafts, drafts and acceptances to the amount aggregating more than $45,000. Almost all of the indebtedness of said Wickham was unsecured and no considerable part of said indebtedness could be recovered and the bank lost by these transactions about $45,000.

11.

By reason of the said losses, and the lack of ready money to meet demands of depositors, the bank, on the 15th of December 1888, suddenly failed, closed its doors went into liquidation and lost its entire capital stock amount, to wit, the sum of two hundred thousand dollars and its accumulated surplus fund of thirty thousand dollars, and by reason of necessity of more money in the hands of the receiver, afterwards with which to pay debts of the bank in liquidation, the said corporation lost the further sum of fifty-five thousand dollars, assessed on the stockholders and from them collected, through assessment by the receiver and the Comptroller of the Currency as is hereinafter recited.

12.

It appears from the books, papers and documents of said bank,—to which the said president, the defendant Richard P. Thomas, had full constant access,—that the said David Gutman, J. H. Woodard, president of the Alameda County Railroad Company,—and D. C. Wickham, the parties above named were respectively indebted to the said bank upon the several debts herein

mentioned in connection with the report of the auditing committee, as follows, to wit:—

David Gutman, indebtedness—July 8, 1888.....	$127 08
" " " Aug. 6, 1888.....	4,566 93
" " " Dec. 15, 1888.....	70,622 49
J. H. Woodard, pres. &c. indebtedness July 8, 1888..	10,052 54
" " " pres. &c. indebtedness Aug. 6, 1888..	30,000 00
" " " pres. &c. indebtedness Dec. 15, 1888..	75,385 00
D. C. Wickham, indebtedness July 8, 1888..... ..	19,793 96
(Time, paper maturing after July 8, 1888.....	16,310 50)
D. C. Wickham, indebtedness Aug. 6, 1888..	42,939 28
" " " indebtedness Dec. 15, 1888.....	51,085 42

13.

Said president easily could have prevented all of the said improper uses of money by discharging the duties of his said trust, and had he done so, said losses would not have occurred, said drafts would not have been bought and said loans would not have been made, but said president, the defendant Richard P. Thomas, entirely ignored and neglected his duties, negligently per-
86 mitted said cashier to do as he pleased with, to misuse, waste and lose the said moneys of the bank, and by reason of the aforesaid negligence of said president and said action of the cashier, so negligently permitted, and the said losses of money resulting therefrom and from lack of moneys which but for the said losses, would have been available; the said bank suddenly failed on the 15th day of December, 1888, and became insolvent; its capital and accumulated funds were wholly lost and it closed its doors, suspended and stopped doing business and the assessment hereinafter mentioned was levied on the stockholders thereof.

14.

At the time of said failure, the corporation in its banking business owed large sums of money, in the aggregate amounting to about $450,000, to divers persons who had been and at the time of said failure were, depositors of money in said bank.

15.

The amount of the actual loss to the corporation—on the three items, in finding No. twelve hereof mentioned,—between the
87 date of the auditing committee's report and that of the failure of the bank,—was the sum of one hundred and sixty-six thousand nine hundred and nineteen,—($166,919) dollars.

16.

From the defendants Robert R. Thompson and Robert A. Wilson—of, for and on account of said loss,—there has, in this action been collected the sum of twenty-seven thousand five hundred,—

($27,500) dollars; leaving a net loss to the bank, of the sum of one hundred and thirty-nine thousand four hundred and nineteen,—($139,419) dollars.

17.

Of the several facts hereinbefore and hereinafter detailed, the Comptroller of the Currency of the United States was duly notified; he thereupon made an examination of the business and affairs of the bank and thereby being satisfied that the corporation was insolvent, that it had lost its capital, had closed its doors, stopped business and failed, he the said comptroller, in due form appointed a receiver, who under the said comptroller closed up the business of the corporation under the law for such case made and pro-
88 vided. The said comptroller by reason of the aforesaid misuses and waste of funds by the cashier, was unable to realize from the assets of the bank enough money to pay all of the debts of the corporation and he was compelled to and did levy and collect an assessment aggregating the amount of $55,000 upon the stockholders of said corporation, with which and what could be realized on the assets of the corporation, he paid all of the debts of said corporation and costs and expenses of closing up the said business.

18.

The plaintiff herein prior to the commencement of this action, in due form requested said corporation, its board of directors, the said receiver appointed to take charge of said insolvent bank, and the Comptroller of the Currency for said corporation to bring suit against the said executive committee and the several members thereof; the above-named defendant herein, for the amount of money which the said corporation lost by reason of the failure of said bank, resulting from the negligence of said committee and its members; and the said corporation, its board of directors, the
89 said receiver and comptroller each and all refused to bring any suit or legal proceedings in the premises; no action other than this present one has been brought in the premises and therefore plaintiff herein, for the benefit of the corporation, brought and he has duly prosecuted this action.

In the bringing and conduct thereof, the said plaintiff has, personally, without aid from any of the other stockholders borne the entire labor and expenses and costs of this suit; and the plaintiff herein employed and furnished the requisite attorneys, counsel and clerical assistance therefore and has paid all the expenses, costs and charges of depositions, notaries' and clerks' fees and done all matters necessary and proper in bringing, presenting and trying this case, and is entitled to a reasonable and proper amount of reimbursement and remuneration for his said time, labor and expenditures in the premises and for his liability incurred to counsel and attorneys for and in behalf of the corporation and the said stockholders thereof.

Dated this 20th day of November, A. D. 1894.

D. J. MURPHY,
Judge of said Court.

90 *Conclusions of Law.*

From the foregoing facts, as conclusions of law, the court now finds that a decree and judgment should be rendered in favor of plaintiff, for the benefit of the corporation, the California National Bank of San Francisco, for the aggregate amount of money lost by reason of said transactions and the failure of said bank, to wit, the sum of $139,419, with legal interest thereon from the 15th day of December, 1888.

That said judgment should be in favor of plaintiff therein, for the benefit of said corporation and against the said defendant Richard P. Thomas, together with costs of suit.

And, as further conclusions of law, the courts finds that the plaintiff herein should be allowed payment on account of his services to the corporation in the premises and for his counsel and attorneys and in consideration of the labor, time and money by him and them done and expended for and in behalf of the corporation, a reasonable amount to be fixed by this court and to be paid out of the first moneys collected in this suit.

91 Let a decree and judgment be entered accordingly.

Dated this 20th day of November, A. D. 1894.

D. J. MURPHY,
Judge of said Court.

Filed Nov. 20, 1894.

Judgment against Defendant Thomas.

(Title of Court and Cause.)

This cause came on regularly for trial, Messrs. Thompson & Thompson and E. S. Pillsbury, Esq., appeared as attorneys and counsel for plaintiff and Messrs. Mesick, Waters & Maxweil,—Messrs. Mastick, Belcher & Mastick,—and H. D. Talcott, Esq.,—and A. R. Cotton, Esq., as counsel for the various and respective defendants.

Whereupon witnesses on the part of plaintiff and defendants were duly sworn and examined, and documentary evidence introduced by the respective parties, and the evidence being closed and the cause, by all of the parties duly and regularly submitted, and

92 the cause having been regularly tried by the court and the findings of facts and conclusions of law having thereupon been duly made and the decision thereon having been duly rendered by the court, and the said findings, conclusions and decision in writing being now on file in this cause wherein judgment was ordered and awarded unto plaintiff against the defendant, Richard P. Thomas for the sum of $139,419.

It is now therefore ordered, adjudged and decreed that the plaintiff herein,—for the use and benefit of the corporation, the California National Bank of San Francisco,—do have and recover from the defendant, Richard P. Thomas, the sum of $139,419 with inter-

est thereon,—at the rate of seven per cent. per annum—from December 15th, 1888, together with plaintiff's costs and disbursements herein, taxed at $319.70.

Done in open court and dated this 20th day of November, A. D. 1894.

D. J. MURPHY,
Judge of said Court.

Filed Nov. 20, 1894.
Judgment recorded Nov. 21st, 1894, Book 23, page 347.

93 *Substitution of Attorney.*

(Title of Court and Cause.)

I hereby substitute J. A. Stephens as attorney in my place and stead for the defendant R. P. Thomas.
May 31, 1895.

H. D. TALCOTT.

I hereby consent to the above substitution.
May 25, 1895.

R. P. THOMAS.

I hereby accept the above substitution, and will act as the attorney of record in the above-entitled action, until further notice.
June 13, 1895.

J. A. STEPHENS,
Room 27, 10th Floor, Mills Building, S. F.

Duly served June 13 and 14, 1895.
Duly filed June 15, 1895.

Notice of Appeal.

(Title of Court and Cause.)

94 Take notice that the defendant Richard P. Thomas hereby appeals to the supreme court of the State of California from the judgment entered in the above-entitled matter on the 21st day of November A. D. 1894, in favor of plaintiff for the benefit of the defendant corporation and against said defendant Richard P. Thomas, for the sum of one hundred and thirty-nine thousand four hundred and nineteen ($139,419) dollars, with interest and costs as therein specified, and from the whole of said judgment.

Dated this 17th day of June, 1895.

J. A. STEPHENS,
Attorney for Defendant Richard P. Thomas.

To the clerk of said superior court, and, Messrs. Thompson & Thompson, attorneys for plaintiff; Messrs. Mastick, Belcher & Mastick, attorneys for defendant, Robert A. Wilson; Byron Waters, Esq., attorney for defendant, R. R. Thompson; Aylett R. Cotton,

Esq., attorney for receiver, S. P. Young; H. D. Talcott, Esq., attorney for defendant, The California National Bank of San Francisco.

Duly served June 17, 1895.
Duly filed June 18, 1895.

95 *Clerk's Certificate.*

I, C. F. Curry, county clerk of the city and county of San Francisco and *ex officio* clerk of the superior court of the said city and county, do hereby certify that the papers set out in the foregoing transcript are full, true and correct copies of the original papers on file in said action in my office, and that said transcript contains a copy of the notice of appeal and of the judgment-roll in said action. I further certify that an undertaking on appeal in due form has been properly filed in said action in my office within the time required by law.

In witness whereof I have hereto set my hand and seal of my office this 24th day of June, A. D. 1895.

C. F. CURRY, *Clerk*,
[SEAL.] By GEO. T. COVEY, *D. C. C.*

96 Due service of the within admitted this 29th day of June, 1896.

THOMPSON & THOMPSON,
Attorney for Plaintiff.

——— ———,
Attorneys for Def't Rob't A. Wilson.
BYRON WATERS,
Attorney for Def't R. R. Thompson,
AYLETT R. COTTON,
Attorney for Receiver, S. P. Young.

——— ———,
Att'y for Def't The Cal. Nat. Bank of San Francisco.

97 Filed July 22, 1896.

Department two.

JOHN CHETWOOD, JR., Plaintiff and Respondent,
vs.
THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO *et al.*, Defendants; R. P. Thomas, Appellant. } S. F., No. 177.

This is an appeal from the judgment alone.

Plaintiff, as a stockholder of the California National bank, prosecuted this action against certain directors of the bank to recover from them, and for the use and benefit of the corporation, the sum of $400,000, alleged to have been lost to the corporation by their negligent misconduct in the management of its affairs.

The bank had become insolvent before the commencement of the

action, and a receiver was in charge of its affairs. Plaintiff made demand upon the Comptroller of the Currency, upon the receiver, upon the corporation and upon its board of directors to prosecute the action, and upon their refusal it was instituted in his name as plaintiff.

The complaint, while it is entitled a bill in equity for an accounting and settlement of a trust, contains, as will hereafter be made manifest, nothing more than a charge *ex delicto* against certain directors for a breach and non-performance of their duties. The three directors whose conduct is attacked, and who are the defendants against whom a judgment is sought, are Richard P. Thomas, president of the corporation, Robert R. Thompson, vice-president, and Robert A. Wilson, a director; the three constituting the executive committee which is created and whose powers are defined by the by-laws.

The president and vice-president were under the by-laws *ex officio* members of this executive committee. The third member, Wilson, was selected by the board.

The complaint sets forth the section of the by-laws defining the powers of the president, and also that section specifying the duties and powers of the vice-president. It contains likewise a by-law defining the duties and powers of the executive committee, which is as follows:

"SECTION 7. There shall be appointed by the board of directors a committee known as the executive committee, consisting of the president, vice-president and one or more directors, to continue to act until succeeded, who shall have and exercise immediate supervision of all the officers and business of this bank; who shall audit all bills for current and other expenses, who shall have power to discount and purchase bills, notes, and other evidences of debt, and to buy and sell bills of exchange, coin and bullion, and loan money on personal security, and who shall at each regular meeting of the board of directors make a report of all bills, notes and other evidences of debt discounted or purchased by them for the bank, and of concurrent and other expenses audited since their last previous report."

The complaint then avers that the three defendants named "were duly elected and by said board appointed the executive committee of said corporation and board of directors;" * * * "and the said three persons have constituted and been the said executive committee under said by-laws; and thereupon each of said defendants Thomas, Thompson and Wilson duly accepted said office, to which they had as last herein aforesaid been elected and appointed;" * * * "and that upon their said election and appointment as such officers, the said three defendants severally, and as such president, vice-president and executive committee, duly accepted the positions of the respective officers, and as provided in the above-mentioned code of by-laws and the above-quoted sections thereof, and duly accepted the trusts and obligations to perform each and all of the duties therein prescribed, with due skill, care, attention, prudence, diligence and fidelity." "That, as such executive committee,

said three persons, Thomas, Thompson and Wilson, as such committee, assumed the discharge of the duties thereof, and in due performance of their duties had from said date of their first appointment continuously until the failure of said corporation the immediate supervision of all the officers and business of said corporation." * * * "On the said three said persons, the above-named defendants Thomas, Thompson and Wilson, as such executive committee, devolved, and continuously remained throughout all of said time, the duty to exercise immediate supervision of all officers and business of said bank for said corporation," etc. "That it was the duty of each of said members of the executive committee to exercise concurrently with his associates on said committee diligence and fidelity in performing the duties of said committee, as above detailed; that well knowing each and all of said facts above recited, said three persons above named, defendants Thomas, Thompson and Wilson, severally being fully aware of the nature and extent of said trust and the duties thereof, accepted and retained said trust, and unto the said corporation promised faithfully to discharge the same and each and all of the said duties thereof in a proper, careful and judicious manner." "That the business of said banking corporation was commenced shortly after October, 1886, but afterward, and for a long space of time, the defendants above mentioned, Thomas, Thompson and Wilson, not regarding their aforesaid duties, nor their respective and concurrent promises in that behalf, but wholly disregarding the same, and *contriving together to injure and deceive the said corporation, neglected and omitted*, without any reasonable excuse, to exercise their own skill, care, judgment and discretion in the making of loans and discounts out of the moneys in the possession of said bank, and otherwise directing the business of said bank, but they negligently permitted the cashier of said bank to control and manage the whole business of the said bank as he saw fit, and without consulting or in anywise informing said defendants, or any or either of them, to lend the moneys of the said bank according to his own pleasure, by bills of exchange, without any consultation with said defendants, or any or either of them, in such manner as he, the said cashier, elected, to dispose of all the moneys of said bank." "That by such negligence, worthless loans, and the various transactions above mentioned, the moneys of the corporation were wasted, misused and lost."

Then follow averments of specific instances of loss occasioned by improvident loans and purchases made by the cashier without the knowledge of these defendants; averments of demand upon the corporation, the receiver and the comptroller to commence suit. It is then averred "that the defendants Thomas, Thompson and Wilson are financially responsible and able to make good the losses which have resulted to said corporation by reason of their said negligence;" and, in conclusion, a prayer "for a decree that the said trustees, the above-named defendants Thomas, Thompson and Wilson, be held to an accounting of their said trust; that they restore unto said corporation the sum of $400,000, with legal interest;

that a joint and several money judgment against them, the
98 said Thomas, Thompson and Wilson, for the sum of $400,000, with legal interest thereon from the time of such loss, and costs herein, be rendered and entered by this court in this case in favor of said corporation, the California National Bank of San Francisco."

For reasons which will hereafter appear, we do not consider it necessary to meet and dispose of many of the objections raised by appellant to this complaint. Therefore, it will be assumed, without deciding, that the complaint is sufficient to state a cause of action in its averments of misconduct, and that its averments of a demand and refusal to prosecute upon the comptroller, the receiver and the corporation itself are sufficient. And so as to other points of objection raised by appellant, the silence of this opinion is not to be construed as a determination of them.

There is no room for argument upon the question as to whether this complaint is upon a cause of action *ex contractu*, or upon one sounding in tort. It demands a joint and several money judgment against three men constituting an executive committee, and charged with the performance of certain duties, for "contriving together to injure and deceive the corporation," and for injuring and deceiving it, by neglecting their duties, in the sum of $400,000. These defendants are charged throughout as joint tort-feasors. If they were not they could not be made defendants in one action. Their contrivance to injure was their joint contrivance. Their neglect is pleaded as their joint neglect to perform, not duties individually imposed upon them, but collectively undertaken as members of the executive committee. It is as members of the executive committee that they are alleged to have done the wrongs and permitted the losses. It is true that the complaint sets forth the by-laws relative to the duties of the president and of the vice-president, but no charge of loss incurred by negligence is made against the president as president. If there were, then, as the other two defendants would not be chargeable with the president for his individual misconduct as president, it would be the subject-matter of a separate action, and have no place in this complaint. The prayer of the complaint, which may be looked to for aid in determining the nature of the proceeding, asks for a joint and several money judgment in the sum of $400,000, with legal interest, against the three defendants. No claim is anywhere made that there is a several and separate liability upon any one of the three, and not upon the others, for any of the acts charged against. To the contrary, from the beginning of the complaint to its prayer for a judgment, it is averred that the loss sustained was suffered through the common and collusive negligence of the three. It is alleged that the three defendants are "financially responsible and able to make good the losses which have resulted by reason of *their said negligence*." If the negligence did not arise in their failure to perform a common duty, they could not and would not have been made joint defendants. The trial court, moreover, found them to be

jointly liable, and ordered a judgment against the three in a single amount.

The gravamen of the charge is the injury to the property of the bank by reason of the wrongful acts of the defendants. For these wrongful acts defendants are liable in tort, and the fact that there might be another cause of action *ex contractu* is a matter entirely apart. It frequently happens that the negligence complained of is the breach of a duty originating in contract, and in such cases the cause of action for tort may coexist with a liability upon the contract. The negligence of a common carrier gives rise to an action *ex contractu*, or to one of trespass on the case. Historically, the action for tort is the older. "If a smith prick my horse with a nail I shall have my action upon the case against him, without any warranty by the smith to do it well. * * * For it is the duty of any artificer to exercise his art rightly and truly as he might." F. N. B., 94 D. Even an intention to violate another's rights of property is not necessary to give one his action for trespass regarding his lands or goods. With or without contract the duty is imposed upon all not to injure the property of another. And for a failure to observe that duty the right of action in trespass for the tort exists.

Such is the cause of action here set up. The averments that defendants "promised faithfully to discharge their trust with due care and attention," etc., are unnecessary, and do not affect the cause of action. The law imposed upon them the duty of using due care when they agreed to discharge their duties as members of the committee. Their failure to use due care was a wrong, for which plaintiff is seeking redress. This wrong is charged, not to have been committed inadvertently or carelessly, which would amount to negligence pure and simple, but to have been wrought against the corporation through contrivance and collusion, with a design to injure it—a charge which establishes that the pleader must have considered that he was dealing with a case of willful tort, partaking of the nature of a fraud.

It is claimed by appellant that the findings are not responsive to the issues joined by the pleadings, and to the understanding of this contention some explanation becomes necessary.

The three defendants answered this complaint, making denial of the charges against them, and trial was had. The court, upon April 27, 1894, made and filed what it entitled an "order of judgment," as follows:

"This cause having been heretofore submitted to the court for consideration and decision, and taken under advisement, and the court having fully considered the same, and being fully informed, it is ordered by the court that judgment be and the same is hereby entered in favor of the plaintiff, and against the defendants, Richard P. Thomas, Robert R. Thompson and Robert A. Wilson, and in favor of the other defendants herein, and, inasmuch as the testimony is unsatisfactory, the court being unable therefrom to determine the amount for which judgment should be entered, it is ordered by the court that a referee be appointed to take proof on that subject," etc.

The referee was appointed, and directed to ascertain and report to the court the amount of the indebtedness due to the bank by certain named debtors thereof, for whose debts the defendants were to be held responsible. Upon August 17, 1894, the referee made his report, and found that there was owing to the bank from these debtors a sum of money in excess of $190,000. After this report had been filed, plaintiff accepted from two of the defendants, to wit: from Thompson and Wilson, the sum of $27,500, and for and in consideration of said sum renounced and withdrew his cause of action against these defendants, and dismissed the same, causing a formal judgment of dismissal to be entered therein. The judgment of dismissal follows the language of the stipulation which the parties entered into, and which declared that the plaintiff "hereby renounces and withdraws his cause of action herein as against the said defendants, and that he will not further prosecute the same;" "that, pursuant to the foregoing renunciation and withdrawal by the plaintiff of his said cause of action, this action be and is hereby dismissed against the said defendants." The order for a dismissal was filed September 24, 1894, and the judgment was formally entered upon the same date. The stipulation for dismissal was, however, entered into upon September 13, 1894.

Upon the 20th day of November, 1894, the court made and filed its findings of fact and conclusions of law. Throughout these findings no mention is made of any dereliction of duty upon the part of Thompson and Wilson. It is not found that the executive committee, or that any member of the executive committee, or that Thompson, or that Wilson, was or was not negligent, did or did not contrive together, or with Thomas, to injure and deceive
99 the corporation. The findings are absolutely silent upon all of these material averments. In them, however, is set forth the by-law defining the duties of the president, and the findings proceed to charge the appellant herein, *as president*, with having himself individually committed acts of negligence by allowing the cashier to make loans which resulted in a loss to the corporation of the sum of $166,919. It is then found that, "from the defendants, Robert R. Thompson and Robert A. Wilson—of, for and on account of said loss—there has in this action been collected the sum of twenty-seven thousand five hundred ($27,500) dollars, leaving a net loss to the bank of the sum of one hundred and thirty-nine thousand four hundred and nineteen ($139,419) dollars." And under these findings a judgment is entered that the California National Bank of San Francisco have and recover from the defendant, Richard P. Thomas, the sum of $139,419, with interest.

There is here an absolute failure by the court to find upon the most material issues of the case, the joint negligence of the three defendants, which alone it is alleged has occasioned loss to the bank. Such is the cause of action pleaded in the complaint. The findings, if it be conceded that they give evidence of a meritorious cause of action against defendant Thomas, do so because of a showing that he was negligent, not with the other defendants and as a member of the executive committee, but that he was individ-

ually and separately negligent in the performance of his duties as president. But this is not the cause of action pleaded againm him, and it is well settled that, where the case made out by the findings is a different case from that presented by the pleadings, the judgment will be reversed; for the relief decreed must be the relief sought, and the variance, even if it be such as could have been cured by amendment, is fatal to the validity of the judgment (Bryan *vs.* Tormey, 84 Cal., 126), and the point may be raised upon appeal from the judgment alone. Putnam *vs.* Lamphier, 36 Cal., 151.

But, while this error would necessitate a reversal, there is yet a more serious objection to be considered. This action, while in form pertaining to equity, is in its cause and substance a legal action to recover damages for tort against the three defendants pleaded as joint tort-feasors. "A suit of this character," says Morawetz (Corp., § 271), "is brought to enforce the corporate or collective rights, and not the individual rights of the shareholders. It may, therefore, properly be regarded as a suit brought on behalf of the corporation, and the shareholder can enforce only such claims as the corporation itself could enforce. Moreover, the essential character of a cause of action belonging to a corporation remains the same, whether the suit to enforce it be brought by the corporation or by a shareholder. Thus, a legal right of action would not be treated as an equitable one, or become governed by the rules applicable to equitable causes of action as to limitations, etc., because a shareholder has brought suit in equity to enforce it on behalf of the company."

In Hun *vs.* Cary, 82 N. Y., 70, just such an action as the one at bar was brought by the receiver of the Central Savings Bank of the City of New York against defendants, who were trustees of the bank, to recover damages which it is alleged they caused the bank by their misconduct as trustees. Objection was made in the appellate court that the cause pertained to equity, and should have been tried before the equity branch of the court, instead of before a jury. The court of appeals used this pertinent language in disposing of the contention: "The receiver in this case represents the bank, and may maintain any action the bank could have maintained. The trustees may be treated as agents of the bank, and for any misfeasance or non-feasance causing damage to the bank they were responsible to it upon the same principle that any agent is for like cause responsible to his principal. It has never been doubted that a principal may sue his agent in an action at law for any damages caused by culpable misfeasance or non-feasance in the business of the agency. The only relief claimed in this complaint was a money judgment, and, we think, was properly tried as an action at law. No equitable rights were to be adjusted, and there was no occasion to appeal to an equitable forum. * * * In actions *ex delicto* the plaintiff may sue one, some, or all of the wrongdoers. * * * This claim was purely for unliquidated damages occasioned by a tort."

While plaintiff may sue one or all of joint tort-feasors, and while he may maintain separate actions against them, and cause separate judgments to be entered in such actions, he can have but one satis-

faction. Once paid for the injury he has suffered, by any one of the joint tort-feasors, his right to proceed further against the others is at an end. Where several joint tort-feasors have been sued in a single action, a retraxit of the cause of action in favor of one of them operates to release them all. The reason is quite obvious. By his withdrawal plaintiff announces that he has received satisfaction for the injury complained of, and it would be unjust that he should be allowed double payment for the single wrong. It matters not, either, whether the payment made was in a large or in a small amount. If it be accepted in satisfaction of the cause of action against the one, it is in law a satisfaction of the claim against them all.

In the case at bar it is disclosed that, after the court had awarded a single judgment, not in separate amounts, but in a lump sum, against the three defendants jointly charged, who were thus found to be jointly liable, the plaintiff accepted from two of them the sum of $27,500 for and on account of the injury and loss which the corporation had sustained, and a judgment of dismissal in their favor was accordingly entered. That this judgment, entered under the stipulation of the parties, was a retraxit there can be no doubt. Merritt *vs.* Campbell, 47 Cal., 542. The findings disclose that payment was made by the two defendants upon account of the judgment ordered against the three jointly, and the release was doubtless in consideration of that payment. Where a joint action is brought against two or more for trespass done, and all are held liable, the judgment must be for joint damages. All legal consequences of a joint judgment must follow. Each is liable for all the damage which the plaintiff has sustained, without regard to their different degrees of culpability, and a release to one discharges all.

The plaintiff in this case, by accepting $27,500 from the two defendants for and on account of the joint trespass of the three, and by releasing them, has released his claim against the third. In Urton *vs.* Price, 57 Cal., 270, an action for personal injuries occasioned by the explosion of chemicals was brought against Price, the demonstrator at a lecture. The charge was negligence. Thereafter plaintiff added The Mechanics' Institute, under whose direction the lecture was given, as a defendant. Subsequently plaintiff filed a stipulation discontinuing and dismissing the action as to the defendant The Mechanics' Institute. Thereupon the defendant Price filed an amended answer, setting forth that after the commencement of the action plaintiff had accepted $500 from the Mechanics' Institute, for and on account of the injury he had received, and had dismissed the suit as to the institute. Judgment was entered in the trial court that plaintiff had received satisfaction for his injuries, and upon appeal to this court it was held that this constituted a release of plaintiff's claim against Price.

In Tompkins *vs.* Clay St. R. R. Co., 66 Cal., 163, plaintiff sued the Sutter Street Railroad Company and the Clay Street Railroad Company for damages for personal injury, alleging that it was occasioned by their joint negligence. The court refused to instruct the jury as follows:

100 "The defendant Clay Street Hill Railroad Company, by its supplemental answer, avers that plaintiff has released and discharged the Sutter Street Railroad Company. If you find from the evidence that the plaintiff has received any sum of money whatever from the defendant Sutter Street Railroad Company, as compensation for the injuries received by her, and has released and discharged the defendant The Sutter Street Railroad Company from all claim for damages arising out of this action, then you are instructed to bring in your verdict for the defendant The Clay Street Hill Railroad Company."

This court reversed the case for the refusal to give this instruction, holding it to be proper, and laying down the rule as here set forth, and as universally accepted, that the release and discharge of one alleged tort-feasor is a bar to further proceedings against the others.

In this case it is true that the release is not pleaded by defendant Thomas in any supplemental answer, but the release itself was given after the court by its order for judgment had fixed the responsibility and the liability of the three defendants, and the record in this case and the declaration of the findings show that the money was paid for and on account of the loss which the court determined had been sustained by reason of the acts of the defendants. It clearly establishes the release and the reason for it. Intolerable fraud and oppression could be worked if a judgment such as this, and so obtained, could stand. The circumstances of this case make that manifest. Three men are charged with having committed acts resulting in a loss to the company of $166,000. The complaint avers that these men are each and all financially able to make good the loss. The case is tried, and the court finds them jointly liable. Upon the announcement of the judgment, two go to plaintiff and purchase their release for a small sum of money, and go free, while the third, who is adjudged by the court to be no more guilty than his fellow-defendants, is cast for the whole amount of the loss. Even if the authorities were not, as they are, unanimous upon the subject, the injustice of such a procedure would be reason enough for the creation of a rule. There is no necessity for creating a rule, however, for we are called upon only to announce that which has long been established and universally followed.

The judgment is reversed and the cause remanded, with directions to the trial court to enter a judgment in favor of the defendant Thomas.

HENSHAW, *J.*

We concur.

McFARLAND, *J.*

TEMPLE, *J.*

101 In the Supreme Court of the State of California.

JOHN CHETWOOD, JR., Respondent,
vs.
THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, a Corporation, *et al.*, Appellants.

By the COURT: Rehearing denied Oct. 21, 1896.

Beatty, C. J., dissenting.

Endorsed: Filed Oct. 22, 1896. T. H. Ward, clerk, by A. W. Johnson, deputy.

102 S. F., No. 177.

San Francisco Co. JOHN CHETWOOD, JR., Pl'ff & Resp., *v.* THE CALIFORNIA NATIONAL BANK OF San Francisco (a Corporation), Richard P. Thomas, *et al.*, Def'ts; Richard P. Thomas, Appellant. — Thompson and Thompson. J. A. Stephens.

1895. S. F., $10.00.
July 3. Filed transcript.
" 3. " affidavit of service of transcript.
Aug. 3. " aff. & order app. 10 days from date to file opening brief.
" 12. " aff. & order app. Aug. 23rd, 1895, to file opening brief.
" 20. " appellant's opening P. & A.
Sept. 6. " stip. and order extending respondent's time until Oct. 7th to file P. & A.
Oct. 5. " resp. P. & A.
Oct. 16. " appellant's reply brief.
1896.
Jan. 28. " notice of motion to dismiss & order shortening time of notice.
Feb'y 3. Motion to dismiss arg., and denied. (1.)
Feb'y 18. Cause arg. and submitted. (2.)
M'ch 3. Filee argument of Mr. Vanness.
July 22. The judgment is reversed and the cause remanded, with directions to the trial court to enter judgment in favor of the defendant Thomas. Henshaw, J. (2.)
We concur: McFarland, J.; Temple, J.
Aug. 12. Filed petition for rehearing.
Aug. 22. By the court: Rehearing denied Aug. 21, 1896, Beatty, C. J., dissenting.
Aug. 22. Remittitur to county clerk.

103 *Judgment.*

Minutes of court.

"Supreme court calendar.

"WEDNESDAY, *July 22nd*, 1896.

"No., S. F., 177.

"Title of Cause.

"CHETWOOD, JR.,
vs.
"CALA. NATIONAL BANK *et al.*

"The judgment is reversed and the cause remanded, with directions to the trial court to enter judgment in favor of the defendant Thomas.

"HENSHAW, *J.*

"We concur.
"McFARLAND, *J.*
"TEMPLE, *J.*"

104 In the Supreme Court of the State of California.

I, T. H. Ward, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of the register of actions and judgment *In re*, S. F., 177, John Chetwood, Jr., *vs.* Cal. Nat'l Bank of S. F. *et al.*, as shown by the records of my office.

Witness my hand and the seal of the court this 19th day of Nov., A. D. 1896.

[Seal Supreme Court of California.]

T. H. WARD, *Clerk*,
By R. A. MARSHALL, *Deputy*.

105 [Endorsed:] No., S. F., 177. In the supreme court, State of California. John Chetwood, Jr., *vs.* Cal. Nat'l Bank of S. F. *et al.* (R. P. Thomas, appellant).

106 In the Supreme Court of the United States.

THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, Plaintiff in Error,
vs.
R. P. THOMAS, Defendant in Error.

Know all men by these presents, that whereas a writ has been allowed by an associate justice of the Supreme Court of the United States, and said writ of error has been issued accordingly, for the purpose of having reviewed the alleged errors committed by the supreme court of the State of California in the matter of its decision

rendered in that certain cause whereby John Chetwood, Jr., was plaintiff and respondent and The California National Bank of San Francisco was defendant and respondent and R. P. Thomas was defendant and appellant, which said cause was numbered in said California supreme court S. F., number 177;

And whereas a citation on said writ has been issued by said associate justice of the Supreme Court of the United States:

Now, therefore, in consideration of the premises the undersigned do joint- and severally undertake and promise on the part of the said plaintiff in error that the said plaintiff in error shall prosecute its said writ to effect, and if it fail to make its plea good that it shall answer all damages & costs not exceeding the sum of $500.00 in lawful money of the United States; for the payment of which amount we acknowledge ourselves jointly and severally bound.

W. H. VANDERSLICE.
C. H. HOLT.

107 The foregoing security is hereby approved this 24th day of Sept., 1896.

STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

108 [Endorsed:] S. F., 177. Security on writ of error. In the Supreme Court of the United States. The Cal. Nat. Bank of S. F., pl'ff in error, *vs.* R. P. Thomas, def't in error. Filed Oct. 19, 1896. T. H. Ward, clerk, by A. W. Johnson, deputy.

109 In the Supreme Court of the United States of America.

THE CALIFORNIA NATIONAL BANK (OF SAN FRANCISCO), Plaintiff in Error,
vs.
RICHARD P. THOMAS and JOHN CHETWOOD, JR., Defendants in Error.

Assignment of Errors and Petition for Writ of Error.

To the honorable the Supreme Court of the United States:

Now comes plaintiff in error (one of the defendants and respondents in the court below) and respectfully shows and represents that manifest error appears on the face of the record in this cause in the following particulars, to wit:

1st. That according to the law of the land the judgment should have been in favor of the plaintiff John Chetwood, Jr., and in favor of the plaintiff in error, the said California National Bank, and against the defendant in error Richard P. Thomas, defendant and appellant in the court below, for the amount found due and unpaid, and the judgment of the trial court holding the said defendant in error, Richard P. Thomas (who was a defendant and appellant in the court below), liable and indebted to the said defendant, The California National Bank (plaintiff in error), in the sum of $139,419.00

and $319.70 costs and interest since November 20th, 1894,
110 should have been affirmed.

2d. That it appears from the opinion and decision by the supreme court of the State of California that its conclusions of law and its decision and judgment are erroneous in each and every particular, and the conclusions of law are not legally deducible from the findings of facts in the record made by the trial court or from the facts as stated and found in the said decision and opinion of the said supreme court of said State.

3d. That it appears from said findings of facts that the said Richard P. Thomas (defendant in error) was and is indebted to said plaintiff in error in the aforesaid sum of money, no portion of which has ever been paid, and that said debt of $139,419.00 remains and always has been and still is wholly and entirely unpaid and unsatisfied and due and owing to said banking corporation (plaintiff in error).

4th. That it appears upon the face of said record that said debt was never satisfied, in whole or in part; that the total debt or sum lost to the said bank, which said R. P. Thomas owed and was liable for, amounted to $166,919.00, which was at the date of the trial of said action due and owing to plaintiff in error from said R. P. Thomas, R. R. Thompson, and R. A. Wilson, defendants, and that the only sum or amount paid thereon was the sum of $27,500.00, paid thereon by said Thompson and said Wilson, which said sum was paid and received on account merely of said debt and as a partial payment thereof only and not otherwise.

5th. That the trial court so found and the supreme court of said State in its opinion so admits, states, and recites the facts
111 to be, and the said supreme court of the State of California therefore had no right or power to decide and adjudge that the said sum of $27,500.00 so paid as aforesaid and as part payment only and on account merely was payment in full and complete satisfaction of said claim and admitted indebtedness and liability of $166,919.00.

6th. That the supreme court of said State erred in holding that said John Chetwood, Jr., defendant in error (plaintiff in court below), had power to accept the said sum of $27,500.00 as full satisfaction of the liability and claim due said plaintiff in error.

7th. That it appears from the record in this cause that the right and title of plaintiff in error to said judgment and to said sum of money arose and was derived from and under the laws of these United States, and particularly those sections of the Revised Statutes authorizing the creation of associations for carrying on the business of banking, and empowering such association to elect and appoint directors, and by its board of directors to appoint a president, vice-president, and cashier and other officers and define their duties, and to prescribe by its board of directors by-laws not inconsistent with law regulating the manner in which its officers shall be appointed, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

8th. That by the articles of association of said plaintiff in error,

lodged with the Comptroller of the Currency in accordance with the laws of these United States, the same power to appoint officers and define their duties and adopt by-laws was given the said
112 association by and through its directors, and the said association (plaintiff in error) afterward adopted by-laws and provided for the appointment of a president, vice-president, and executive committee, fixed and defined the duties of said officers, and appointed said defendants to said offices respectively, and said defendants, Thomas, Thompson, and Wilson, thereupon assumed the duties so imposed and contracted and agreed with plaintiff in error faithfully to perform all obligations, and it is by a breach of the contractual relations and obligations so imposed that the said indebtedness and liability arose, and said suit was brought to recover for such breach.

9th. That the supreme court of said State erred in holding and deciding that no duties arose or were imposed by said by-laws, and in deciding that the action was a suit to recover for a tort, to wit, an obligation arising independent of contract and not imposed by said by-laws and defined by said association through its directors, in accordance with and in pursuance of the said power given under and by virtue of the laws of these United States.

10th. The said supreme court of said State further erred in holding that there was not a sufficient finding of the liability of the said defendant, R. P. Thomas, to uphold the judgment, and erred in reversing the said judgment for this reason, and erred in ordering judgment in his favor.

11th. The supreme court of said State erred in finding and deciding that the liability of said defendants in error arose by reason of negligence unconnected with any contract, and erred in failing to find and decide that the liability arose from under and by
113 virtue of the contract entered into under and in pursuance of the provisions of the laws of these United States and the obligations so assumed, which depend for their force and efficacy upon and arise under the said laws of the United States.

12th. The supreme court of said State erred in holding and deciding that the said liability and indebtedness was a mere tort or common-law liability arising independent of said contracts and independent of said laws of these United States.

13th. The supreme court of said State erred in holding that there was a failure to find upon defendant's joint negligence, and erred in not upholding the judgment made and entered by the trial court, and erred in reversing it on this ground, and erred in deciding that the case made out by the findings of the trial court was different from the case pleaded in the complaint, wherein plaintiff (below) set up and alleged the facts constituting the said contractual relation and the said by-laws of said national bank and the breach of the duties so imposed and obligations so assumed and the rights of said national bank arising under said by-laws and the laws of these United States and the obligations of the officers of the said national bank arising under its by-laws and the said laws of these United States.

14th. The supreme court of said State erred in disregarding the allegations of said complaint with reference to said by-laws and said laws of these United States, and erred in treating them as mere surplusage and of no weight or moment in giving character to said pleading, and erred in disregarding the findings of facts upon
114 said complaint made by the trial court, wherein the liability of said defendant, R. P. Thomas, is based and predicated upon said by-laws and said laws of these United States, and erred in denying plaintiff and plaintiff in error the right to have and recover and collect of said R. P. Thomas the judgment rendered and the sums of money claimed as a debt accruing and due under and by virtue of the said by-laws and the said provisions of the Revised Statutes of these United States.

15th. That it is and has been ever since the Dartmouth College case a settled law of these United States and of the State of California that the said articles of association and the said by-laws of said corporation are each and every one of them contracts, and breach of the obligation of such contracts or of either of them gives not only rights under the laws of the United States, but the obligation thereof, and one term or condition thereof has been and was prior to the said decision in this case that a claim or chos- in action arising from a breach of such articles of association or the duties imposed thereby or by the by-laws could not be satisfied without full payment.

That the said decision of the supreme court of said State is an act of legislation, and by said decision the said State of California has passed a law impairing the obligation of the contracts made and existing by and between the said plaintiff in error, its stockholders and officers, the defendants in error.

16th. That by said decision of the supreme court of said State the said State has deprived this plaintiff in error of its property,
115 to wit, the said unpaid balance of the said $166,919.00, to wit, of the said sum of $139,419.00, without due process of law, contrary to the provisions of the 14th amendment to the Constitution of the United States.

17th. That the lower court at the trial found and decided and the supreme court of said State in its opinion also found and decided that said plaintiff in error was entitled to recover of said R. P. Thomas (defendant in error) the said sum of $139,419.00 over and above the said sum of $27,500 00 paid, and the supreme court of said State further decided and stated in its opinion that the trial court had so decided and had rendered judgment for said total sum of $166,919.00 before the payment of said $27,500.00 on account thereof.

That thereafter no proceedings were had and nothing done to deprive this plaintiff in error of its said property in said sum of money other than as recited in the said decision and in the record herein, which said proceedings were and amounted to a mere dismissal of the action as against two of the defendants in error, and receipt of the said sum of $27,500.00 which was paid into court and not to plaintiff nor to plaintiff in error, and which was paid and

received on account merely of said total liability indebtedness or loss.

That the said dismissal was the act of plaintiff, who is now a defendant in error, and was not the act of this plaintiff in error, and was given and made after the trial court had rendered its judgment and announced and decided and adjudged that the plaintiff in error was owner of said total sum of $166,919.00 and entitled to have and recover the same of and from said defendants in
116 error; all of which appears and is stated, recited, and admitted in the opinion and decision of the supreme court of said State.

And the said court last mentioned erred in holding, finding, and deciding that such payment and dismissal were a satisfaction.

The supreme court of said State erred in deciding that such procedure was due process of law, whereby such indebtedness could be satisfied, and erred in not deciding that such proceedings did not amount to due process of law, and erred in deciding that said proceedings by plaintiff were, according to the law of the land, a satisfaction of the cause of action and the debt due plaintiff in error, and erred in not deciding that said proceedings were not a satisfaction according to the law of the land, and that they were not due process of law and were not in accordance with the common law or the law of the land.

The supreme court of said State erred in deciding that any act or proceeding or step taken or stipulation or dismissal or order or judgment made on mere motion of said plaintiff and after the said decision of said court in favor of plaintiff in error without notice to this plaintiff in error or its consent was sufficient to satisfy, cancel, destroy, or deprive this plaintiff in error of its property, to wit, the said debt so due it, and the judgment of said trial court so awarded, and by the decision of said court so deciding the said State has deprived plaintiff in error of its property without due process of law.

18th. The said supreme court of said State erred in deciding that a dismissal is a retraxit.

117 19th. The said court erred in deciding that a retraxit ever amounted to or was the same as or imported a satisfaction or was or is identical with full payment and satisfaction.

20th. The decision of said supreme court of said State which admits that plaintiff in error had and owned a sum of money in the hands of defendants in error amounting to $166,919.00 and had been awarded a judgment therefor, but further decides that payment of a portion of said sum into court and a dismissal of the action by the nominal plaintiff destroyed and satisfied said claim and judgment, took the property of plaintiff in error without due process of law.

21st. That by said decision of said supreme court of said State, wherein it states and decides that a retraxit at common law imported or now imports or was identical with a satisfaction independent of the intent of parties thereto, the said court of said State erred in its interpretation of the law of the land, and such decision takes and

has taken and deprived this plaintiff in error of its property without due process of law.

22*th*. By the said decision the said State has denied to the plaintiff in error and its stockholders the equal protection of the laws, and thereby infringed and erred against the letter and spirit of the 14th amendment to the Constitution of these United States.

The supreme court of said State erred in denying plaintiff (acting on behalf of plaintiff in error) the right to call its officers appointed under and in pursuance of the laws of these United States to an account, and in refusing to sustain said right to an accounting
118 of their said trust imposed by and under the laws of the United States, and in deciding that plaintiff and plaintiff in error had sued to enforce a mere tort independent of the liability imposed by statute and by the acticles and by-laws of said association (plaintiff in error), and in deciding that the right to an accounting under said laws of the United States did not exist, and that the plaintiff in error had no right to call its said officers to an accounting of their said trust under said statutes of the United States, and in denying said right, and in deciding that the said statutes gave plaintiff and gave plaintiff in error no such or similar right and imposed no duties or liabilities on said Thomas, Thompson, and Wilson, defendants, and in deciding that this action was one of pure tort, with all the peculiar and technical rules of the common law applying thereto, instead of an action for an accounting and to enforce the liability of officers of a national bank under the statutes of the United States.

23d. That the said decision of said supreme court of said State is a final decree in the highest court of said State in which a decision in this suit could be had.

24th. In said suit the authority of this plaintiff in error, a national bank, one of the instruments designed to aid the Government of the United States in the administration of an important branch of the public service exercised under the United States, through its directors, over its president, has been drawn in question and the said decision is against the validity of such authority, and
119 the right of the plaintiff to recover for the plaintiff in error and of the plaintiff in error to have and recover and retain through a suit in equity an accounting for moneys of the said bank taken and paid out under or by the connivance or through the fault of said defendants, Thomas, Thompson, and Wilson, is a right that plaintiff (on behalf of plaintiff in error) and plaintiff in error claimed and claim under the Revised Statutes of these United States and under the charter and commission held under the United States to said bank (the plaintiff in error), granting it power and allowing it, through its directors, to exist and do business and adopt by-laws, appoint officers, and define and enforce their duties and under authority exercised under the United States, and such right plaintiff, on behalf of plaintiff in error, and plaintiff in error claimed in this suit, and such right was denied by said supreme court of said State, and therein said court erred.

Said plaintiff in error, also, and said plaintiff in behalf of said

plaintiff in error claimed in said suit that under the Constitution and statutes of the United States and its articles of association entered into in pursuance thereof and under its certificate of organization made in accordance therewith that it had the privilege of making its officers responsible in contract and not solely in tort and of calling them to accounting in equity of their said trust so imposed under said laws of the United States, which said privilege so claimed was denied, and therein said court erred.

The said plaintiff in error (and plaintiff on behalf of plaintiff in error) also claimed in said suit that under said statute and
120 commission held and authority exercised under the United States they (said plaintiff and plaintiff in error) enjoyed immunity from the rules applicable to ordinary action for tort, and that the liability imposed upon said officers of said plaintiff in error to make good any losses occasioned to said bank was a liability which, by virtue of the creation and organization of said association under the laws of the United States, could not be satisfied by a payment of part of the said loss and a release of one of said officers from such liability, but that each and all of said officers, by accepting such position as such officers of said national bank, became liable to an accounting for and of his said trust and contracted to comply with the by-laws of said bank and to make good any loss caused through his act or omission, and this immunity from technical rules applicable to suits in tort, so claimed by plaintiff and plaintiff in error, said supreme court of said State denied and decided against the said rights, privileges, and immunities so as aforesaid claimed, and therein erred.

That said plaintiff in error (and plaintiff in behalf of plaintiff in error) claimed in this suit that after the order of the judge of the trial court announcing and adjudging that plaintiff was entitled to a judgment on behalf of plaintiff in error against defendants Thomas, Thompson, and Wilson this plaintiff in error had control of said action and of said judgment, and that said judgment and said moneys so awarded it were and are the property of plaintiff in error, and under the Constitution of the United States the plaintiff in error could not be deprived of its property in said sum of money and in said judgment so awarded it by any act of plaintiff, John Chetwood (now defendant in error), who
121 was and is the nominal plaintiff only and a stockholder in plaintiff in error merely, and who sued on behalf of himself and other stockholders and recovered a judgment in favor of plaintiff in error, and that the said alleged dismissal of said suit by said nominal plaintiff, Chetwood, on the payment of $27,500.00 was not only not intended by said Chetwood to operate as a satisfaction of the said total liability, amounting to $166,919.00, as found by said trial court and stated and admitted, found and recited by said supreme court of said State in its decision, but, further, the said acts of said Chetwood could not deprive this plaintiff in error of its right to a judgment for said balance of said sum, to wit, $139,419.00, against the defendant in error, R. P. Thomas, and the said plaintiff in error claimed that it was under the Constitution of the United

States entitled to have and recover such judgment against said R. P. Thomas despite the said acts of said Chetwood, and claimed that the decision of the said supreme court adjudging and decreeing that such proceedings and acts by said Chetwood satisfied said claim and liability and debt due plaintiff in error and said judgment and released the said R. P. Thomas from all liability to plaintiff in error deprived this plaintiff in error of its property without due process of law, and by such final decree of said supreme court of said State the said State would and it did deprive said plaintiff in error of its property without due process of law, and the said supreme court of said State decided against the said right and title to said moneys so claimed by said plaintiff in error, and therein erred.

122 The plaintiff in this cause claimed on behalf of plaintiff in error and plaintiff in error claims that a true construction of the laws of the United States, and particularly sections 5136 Rev. Stat., gave plaintiff in error a right to recover of defendant in error for the losses caused by failure to supervise the acts of the cashier of said bank as for a breach of his trust as trustee and president and of his contracts entered into as such officer and stockholder of the bank with the plaintiff in error.

The supreme court of said State denied said right and said claim and decided that no right existed save the right to sue in tort, and therein erred.

The plaintiff claimed that he did not satisfy the debt due plaintiff in error by allowing $27,500 on account thereof to be paid into court and withdrawing his cause of action as against the parties paying said sum, and plaintiff in error claimed and claims in said suit that the nominal plaintiff, a mere stockholder, had no power to satisfy said debt after the trial court had awarded plaintiff in error a judgment or to accept part payment in full payment and satisfaction of such debt due and judgment recovered by and on behalf of said corporation; and plaintiff and plaintiff in error claimed that under the Constitution of the United States and the 14th amendment thereof the said courts of said State had no power to decree the said judgment so rendered on April 27, 1894, or the judgment entered and recorded November 20th, 1894, paid and satisfied by reason of a retraxit or by reason of any act done or proceeding taken by said nominal plaintiff thereafter or theretofore or between said dates or ever or at all, and that said courts

123 under said Constitution had no power to order that the formal judgment thereafter entered on November 20th and 21st, 1894, in accordance with the finding filed be reversed on this ground, and had no power to order on this record that judgment be entered therein or herein in favor of defendant in error, R. P. Thomas, for his costs or at all.

The plaintiff in error and plaintiff in its behalf also at all times claimed in this suit and claim that plaintiff in error was and is entitled to have and recover said unpaid balance of said debt or said sum of $139,419.00 of and from said R. P. Thomas, and that said money and the judgment rendered therefor in this suit by the trial

court on April 27th, 1894, and entered and recorded Nov. 20th and 21st, A. D. 1894, was and is the property of said bank, plaintiff in error, and under the said Constitution due process of law was necessary before said bank could be deprived of said sum or of said judgment or the said judgment satisfied.

That a retraxit by the nominal plaintiff given to one or more of the defendants in said cause does not, did not, and could not operate as a satisfaction of the judgment theretofore rendered or of the judgment thereafter entered and recorded in favor of plaintiff in error against the remaining defendant (the defendant in error), R. P. Thomas.

That to so hold or decide was to deprive plaintiff in error of its property without due process of law, contrary to said Constitution and amendment thereto.

The decision of said supreme court of said State on said matter and said claims was in words and figures following:

124 "In the case at bar it is disclosed that after the court awarded a single judgment, not in separate amounts, but in a lump sum, against the three defendants jointly charged, who were thus found to be jointly liable, the plaintiff accepted from two of the (3) three the sum of $27,500.00 for and on account of the injury and loss which the corporation had sustained, and a judgment of dismissal in their favor was according entered.

"That this judgment, entered under the stipulation of the parties, was a retraxit there can be no doubt.

"The findings disclose that payment was made by the two defendants upon account of the judgment order against the three jointly," and said supreme court further decided this case in language as follows: * * * The plaintiff in this case by accepting $27,500 from the two defendants for and on "account of the joint trespass of the three and by releasing them has released his claim against the third," and therein the court erred.

The said judgment of the supreme court of said State thus interpreted and adjudged a mere dismissal or retraxit given by the nominal plaintiff after recovery of a judgment in favor of the plaintiff in error against a defendant not dismissed from the action, and judgment thereon as a release and satisfaction of the whole sum due this plaintiff in error, although only a part of said debt or sum due was paid and the judgment rendered and thereafter entered up, was for the unpaid balance alone.

That this judgment and decision of said supreme court of
125 said State, therefore, was rendered without due or any process of law and deprived this plaintiff in error of its property without due process of law, contrary to the 14th amendment to the Constitution of the United States, and the said judgment was and is repugnant to said Constitution, and by said judgment the said State has denied to plaintiff in error and to its stockholders the equal protection of the law.

The only release given was the dismissal given by the nominal plaintiff and the judgment entered thereon in favor of Thompson and Wilson, leaving Thomas (defendant in error) liable for the

balance, and this was, as the said court decided, "given after the court, by its order for judgment, had fixed the responsibility and the liability of the three defendants."

The appellate court of said State, in holding and by its judgment deciding that this procedure released defendant in error from all liability, deprived plaintiff in error of its property, to wit, said debt and judgment, without due process of law.

The supreme court of said State erred in deciding that such procedure might lead to fraud or oppression of defendants or any one.

The said court erred in deciding that the payment of part of said claim satisfied the claim in full, whereas in this case it was not so intended by the trial court or by any of the parties and was not so found or decided by the trial court, but the contrary.

126 The said supreme court of said State erred in stating and deciding that "the injustice of such procedure would be reason enough for the creation of a rule to apply to this case," as the plaintiff in error and its stockholders represented by plaintiff are the real party injured and unjustly dealt with by said State courts, and the defendant in error, R. P. Thomas, was benefited and helped, not harmed, by plaintiff or plaintiff in error, nor unjustly treated by the trial court or by any one.

The said court erred in deciding that "where several joint tort-feasors have been sued in a single action a retraxit of the cause of action in favor of one of them operates to release them all," since a retraxit differs from an accord and satisfaction and from a judgment and satisfaction and from a satisfaction and differs from a release, and in applying such erroneous rule to this case at bar the said supreme court, by its judgment reversing the judgment plaintiff in error had recovered against defendant in error and ordering judgment in favor of defendant in error because of a dismissal given to defendants Thompson and Wilson by the nominal plaintiff after recovery of said judgment in favor of plaintiff in error, took from and deprived this plaintiff in error of its property in said unpaid balance of said judgment, to wit, in said judgment as finally entered up, and deprived said bank of said property without due or any process of law, and denied to plaintiff and the other stockholders of said plaintiff in error the equal protection of the laws by such act and decision, contrary to the Constitution of these United States.

127 Wherefore plaintiff in error prays that a writ issue to review said judgment and decree of said supreme court of said State, and that the judgment of said supreme court of said State so rendered against it in this cause on the 22nd day of July, A. D. 1896, be reversed, and that judgment be ordered entered herein on the findings in favor of plaintiff in error for the sum found due it from said R. P. Thomas, defendant in error, with interest, or that the said judgment of the said supreme court be reversed and an-

nulled and said supreme court be commanded to affirm the judgment of said trial court, to wit, of said superior court.

EDDY KNAPP AND
A. W. THOMPSON,
Attorneys for said Plaintiff in Error.

[Endorsed:] No. S. F., 177. In the supreme court, State of California. On error to the Supreme Court of the United States. The California National Bank, plaintiff in error, *vs.* R. P. Thomas & J. Chetwood, Jr., defendants in error. Petition for writ of error and assignment of errors. Filed Oct. 19, 1896. T. H. Ward, clerk, by A. W. Johnson, deputy. E. G. Knapp, Mills building, sixth floor, attorney for pl'ff; rooms 5 and 34, San Francisco, Cal.

128 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the justices of the supreme court of the State of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court of the State of California, before you, being the highest court of law or equity in the said State in which a decision could be had in the said suit between John Chetwood, Jr., plaintiff and respondent, and The California National Bank of San Francisco, defendant and respondent, and Richard P. Thomas, defendant and appellant, wherein was specially set up and claimed by the said California National bank and by John Chetwood, Jr., plaintiff and respondent, in its behalf a title and right under the Revised Statutes of the United States, sec. 5136 and other sections, and under the Constitution of the United States and the fourteenth amendment thereto, and the decision was against said right, title, and privilege, and said decision deprived said California National bank of its property without due process of law and contrary to the law of the land, and denied it the equal protection of the laws, a manifest error hath happened, to the great damage of the said California National Bank of San Francisco, as by *his* complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the 23rd day of November next, in the said Supreme Court of the United States to be there and then held, that, the record and proceedings aforesaid be- inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Su-

preme Court of the United States, this
Seal U. S. Circuit Court, Northern Dist. Cal. 24th day of September, in the year of our Lord one thousand eight hundred and ninety-six*th*, and of the Independence of the United States the one hundred and 21st.

W. J. COSTIGAN,
Clerk of the Circuit Court of the United States for the Ninth Circuit and Northern District of California,
By W. B. BEAIZLEY,
Deputy Clerk.

The above writ of error is hereby allowed.
STEPHEN J. FIELD,
Justice of the Supreme Court of the United States.

129 [Endorsed:] S. F., 177. United States Supreme Court. The Cal. Nat. Bank of S. F., plaintiff in error, *vs.* R. P. Thomas, defendant in error. Writ of error. Filed Oct. 19, 1896. T. H. Ward, clerk, by A. W. Johnson, deputy.

130 UNITED STATES OF AMERICA, *ss:*

To Richard P. Thomas, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 23d day of November, A. D. 1896, pursuant to a writ of error which has been allowed and filed in the office of the clerk of the supreme court of the State of California, wherein The California National Bank of San Francisco is the plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment and decision in the said writ mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Stephen J. Field, associate justice of the Supreme Court of the United States, this 24th day of September, A. D. 1896, and of the Independence of the United States the one hundred and twenty-first.

STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

131 [Endorsed:] S. F., 177. In the Supreme Court of the United States. The California National Bank of San Francisco (pl'ffs in error) *vs.* Richard P. Thomas, defendant in error. Citation. Filed Oct. 19, 1896. T. H. Ward, clerk, by A. W. Johnson, deputy.

Personally served on R. P. Thomas Oct. 19th, 1896.

E. G. K.

Personal service of within citation on said def't in error and on his attorneys by copy admitted this 19th day of October, A. D. 1896.

PIERSON & MITCHELL,
Attorney- for R. P. Thomas, Defendant in Error.

Service of the foregoing writ of error and citation admitted the 6th ——, 1889.

ROBT. A. FRIEDRICH,
Att'y for T. K. Stateler, D'f't in Error.
J. A. STEPHENS,
Formerly Att'y for R. P. Thomas.
AYLETT R. COTTON,
Att'y for S. P. Youny.
MASTICK, BELCHER & MASTICK,
Attorneys for R. A. Wilson.

Service of the foregoing writ and citation are hereby admitted as a def't in error, but this def't in error asks that he be entered as the plaintiff in error herein instead, and for that purpose, if necessary, said writ be amended in that regard.

JOHN CHETWOOD, JR.,
In Propria Persona.

132 *Clerk's Certificate.*

In the Supreme Court of the State of California.

THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO *et al.*, Pl'ffs in Error,
vs.
R. P. THOMAS *et al.*, Def'ts in Error.
} No. S. F., 177.

I, T. H. Ward, clerk of the supreme court of the State of California, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 123, both numbers inclusive, and page 100½, contain a full, true, and correct transcript of the proceedings in the case above entitled, and that the same together constitute the return to the annexed writ of error.

And I further certify that at the time said writ of error was filed in the office of the clerk of said court the plaintiffs in error lodged with me as clerk of said court, in said office, a copy of said writ for each of the defendants in error, six in all. I further certify that under the rules of court the petition for hearing in bank filed herein on August 12th, 1896, operated as a stay of all proceedings in this cause until the order made thereon, filed August 22nd, 1896, copy of which is included in the foregoing record.

Witness my hand and seal of said supreme court this 6th day of November, 1896.

[Seal Supreme Court of California.]

T. H. WARD, *Clerk*,
By R. A. MARSHALL, *Deputy*.

Endorsed on cover: Case No. 16,452. California supreme court. Term No., 673. The California National Bank of San Francisco, plaintiff in error, *vs.* Richard P. Thomas. Filed December 17, 1896.